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MICHELLE EVERSON

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British Citizenship: Autonomy and Representation

MICHELLE EVERSON

Paper prepared for the Deutsche Forschungsgemeinschaft in the framework of a Project on the 'Concepts, Limits and Foundations of European Citizenship', conducted by and at the Centre for Law and Policy at the University of Bremen.

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Preface*

The following analysis of the concept of citizenship within the United Kingdom was developed and written within the context of a project on the 'Concepts, Limits and Foundations of European Citizenship,' funded by the *Deutsche Forschungsgemeinschaft* and conducted by and at the *Zentrum für Europäische Rechtspolitik* (University of Bremen) during the years 1994-1998. In this regard, however, it need be noted that this study on UK citizenship is presented at a unique moment in British political and constitutional history. The 1997 election of a Labour Government committed to a wide-ranging reform of the representative and legal institutions which constitute the British State has had a profound, though to date incalculable affect, upon the scheme of governance and social organisation within the United Kingdom. Recent legislative reform has encompassed the creation of a Northern Ireland Assembly and institutionalised power and sovereignty sharing with the government of Southern Ireland, devolution in Scotland and Wales, the establishment of a partially-entrenched Bill of Rights, as well as a long-term project for the introduction of proportional representation within the Westminster Parliament. On the one hand, such legislative programmes have clearly given a new meaning to social movements and cultural aspirations long dormant within the UK debate upon the concept of citizenship. Thus, for example, devolution movements have at last given institutional recognition to Scottish and Welsh claims to distinct cultural identities, while the Northern Ireland Agreement's explicit of 'multi-lateral' (British, Irish and European) citizenship has likewise given formal and timely expression to the plurality of national identity present within Northern Ireland. On the other hand, however, such new arrangements are as yet indistinct both as to their finer details and as to the main theoretical perceptions of (national and post-national) governance that underpins them. In short: the reforms envisaged are highly novel, and only lengthy experience will tell what affect they will have on UK governance and its concept of citizenship.

Given both the profound nature and novelty of the reforms envisaged, the present author has not sought retrospectively to include them within this study. Indeed, in the author's opinion, any such attempt would merely prove misleading—suggesting that what is now best to be regarded as a concept of citizenship in evolutionary flux be a culturally stable artefact. Instead, it is hoped that the approach taken by this study and, in particular,

* Thanks are due to Matthias König-Archibugi, Edwige Levebre and U.K. Preuß for constant support and vital insights.

its attempts to give a broad historical overview of the political/philosophical perceptions which have underpinned the constitutional relationship of the individual Briton with the British State (or 'deep concept' of UK citizenship) will provide a useful point of departure for those readers wishing to understand why reform is now being undertaken at all (especially, with regard to a Bill of Rights), as well as, and perhaps more importantly, why the dissolution of UK citizenship into a series of interconnected cultural (and even supranational) identities is now being achieved with an ease unimaginable in most European states.

This study has its conscious focus upon the constitutional thought which has informed perceptions of 'Britishness' and the British citizen. As an important consequence, it pays little direct attention to notions of 'otherness' developed in areas of the UK which have historically been distanced from an (English) governmental and legal centre. It is nevertheless hoped that it sheds some light upon the recent institutionalisation of Welsh, Scottish and Irish identities. Indeed, the central theme of this study is its argument that the 'deep concept' of UK citizenship is characterised by a traditional refusal to conflate the notion of the Briton with that of the British State: an abiding political and institutional legacy which has made it easy for late 20th Century reformers to at last give recognition to the claims of various groups within the British Isles to distinct and complex cultural/political identities.

I. Introduction: T.H. Marshall in Context

When seen in conjunction with the modern and constitutional state, the generally contested concept of citizenship acquires an axiomatic quality. An integral part of state and constitutional theory, the notion of state-based citizenship is predicated upon a logic all of its own. Born of French revolutionary action and Rousseau's philosophical musings, modern citizenship supplies the essential bridge between competing notions of individual autonomy on the one hand, and the exercise of sovereign state power on the other. In both guaranteeing individual moral freedom by means of personal civic rights, and creating an indissoluble link between the individual citizen and the sovereign polity through an extensive (though rarely if ever universal) political franchise, the state-based notion of citizenship both formally constitutes the autonomous citizen and sets the limits to personal autonomy; establishing and legitimising the indivisible sovereign power of the polity, or *community* of citizens incorporated within and embodied by the state.

Students of 'real' political power have long criticised this notion of citizenship, with 'masters of suspicion' from both the left and the right of the political spectrum considering the claim of citizenship fully to incorporate or include the individual citizen within the political community, or state, to be pure 'rhetoric.'[1] In this view, citizenship is in fact little more than a bourgeois panacea: a convenient rallying-call, mostly used to conceal the fact that real (political or economic) power is exercised by relatively few people. As is the way with axioms, however, such realist critiques have little or no impact upon a normative view of citizenship which in common with legal notions of sovereignty,[2] may be argued to be concerned less with reality and more with its own logical unity. On its own terms, the modern state-based concept of citizenship is thus advantaged above and moves beyond its classical city-based counterpart, no longer conceiving of the citizen merely as an adjunct of the *polis*; a dependent segment of a greater whole whose moral personality is determined by the political community and who has no existence outside it.[3] Instead, a modern, or second citizenship[4] pays due regard to a 'natural' view of man, confirming individual moral autonomy through declaration or through entrenched rights,[5] but at the same time granting political rights to individual citizens in order to establish the supremacy of the citizenry: a unitary body whose sovereign and indivisible power is legitimised by its status as a community of autonomous and freely contracting individuals.

A philosophical and constitutional construction which allows the individual simultaneously to be identified as subject and citizen, bound to obey the sovereign and yet through voluntaristic association forming a part of and legitimising that same unitary power,[6] state-based citizenship

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[1] Hindess, 'Citizenship in the Modern West,' in Bryan S. Turner (ed), *Citizenship and Social Theory*, (Sage: London, 1993).

[2] Harald Laski, 'Law and the State,' reproduced in, P. Hirst (ed), *The Pluralist Theory of the State*, (Routledge: London 1993).

[3] For an excellent examination of this point, Riesenberg, *Citizenship in the Western Tradition*, (Chapel Hill: London, 1992).

[4] *Ibid.*

[5] *Ibid*, and Preuß, 'Two Challenges to Modern Citizenship,' in (1996) *Political Studies*, Special Edition, 'The Constitution in Transformation,' D. Castiglione/R. Bellamy (eds).

[6] In Rousseau's exact words, 'Those who are associated with it [sic. the sovereign power] take collectively the name of a *people*, and call themselves individually *citizens*, in that they share in the sovereign power, and *subjects*, in that they put themselves under the laws of the state, *Social Contract*, Book I, Chapter 6

squares the circle between a view of man as wholly independent and fully able to determine his own actions, and an understanding of society as an association of men, tenable only if governed by one undisputed authority. Placing the autonomous citizen at the heart of the unitary sovereign power as a matter of logic, the normative view of citizenship is thus relatively untroubled by a realist critique which points out that the granting of the franchise is generally not synonymous with the receipt of real power. Instead, the debate on citizenship struggles with logical questions and inconsistencies of its own: nationhood and the question of the closure of community—or Rousseau *vs* Herder and the ethnic versus the universal view of the closed community of *national* citizens; community versus individualism, or the degree to which personal interests might prevail over those of the citizenry; and the related issue of the constitutional affirmation of personal autonomy and the consequent restriction in the immediate power of the national polity.

Moving to the world of real Nation States, these logical questions and the manner of their address and resolution are argued to give rise to differing and 'deep'[7] national concepts of state-based citizenship. The basic autonomy-bestowing and sovereignty-guaranteeing structures of citizenship remain the same, but Germany's supposed commitment to an ethnic view of the state as a particularistic handmaiden of the interests of one pre-politically defined community, and its consequential restriction of the franchise to individuals sharing in a 'German blood-line,'[8] is said starkly to distinguish its national view of citizenship from that of the French; an inclusionary perception which apparently honours its debt to Rousseau by rejecting exclusionary tribalism and delineating the national political community solely upon the basis of the individual citizen's proven commitment to the universalist mores which underlie the Republic.[9] Equally, however, French republicanism, as opposed to American liberalism, is also argued to leave its indelible mark upon French

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[7] A. Favell, 'Philosophies of Integration: The Theory and Practice of Ethnic Minority Politics in France and Germany,' PhD Thesis, (EUI: Florence, 1995), with a somewhat mocking reference to the results of recent investigations into French and German 'nationhood,' more specifically, W.R. Brubaker, *Citizenship and Nationhood in France and Germany*, (Harvard University Press: Harvard, 1992).

[8] Though the 'ethnic' is generally much overstated, cf, K.H. Ladeur, 'Towards a Legal Theory of Supranationality: the Viability of the Network Concept, (1997) 3:1 *European Law Journal*, 3-33.

[9] Recent research again demonstrating that this is very much an idealised view of 'frenchness,' cf, A. Favell, *op cit*, n 7.

citizenship, with the *citoyen* varying from his unashamedly individualistic American counterpart by virtue of his relative lack of entrenched personal protection from the immediate will of the political community. Whereas judicial interpretation of constitutional 'self-evident truths' has long guaranteed the US citizen (though historically to varying degrees) an extraordinarily wide degree of personal autonomy, the limited constitutive nature of the revolutionary 'Declaration of the Rights of the Citizen and of Man,' continues to determine that the natural liberty of the *citoyen* is considered best to be safeguarded by the logical assumption that a polity made up of autonomous contracting individuals will do nothing collectively which might alienate separable and constitutive individual freedom.[10]

Tackling the specific topic of this paper, however, it is striking that one supposedly 'deep' concept of national citizenship seems to be little concerned with the normative questions which have marked the debate on the citizen elsewhere. Long accepted as the definitive statement upon citizenship within the United Kingdom, T.H. Marshall's classic analysis of the relationship between class formation and the evolution of citizenship pays little if no attention to traditional philosophical issues such as the identification of the national community and the balancing of individual and collective interest, and appears instead to go some way to answering realist critiques of citizenship.[11] A milestone in citizenship theory, Marshall's historical description of citizenship development within the UK not only relates abstract debate to concrete events, but also characterises citizenship as an institution which combats 'real' imbalances in economic and political might.

In this view, citizenship was not a philosophical construction but had simply evolved through the combined forces of 17th Century jurisprudence and subsequent industrial class formation: the judicial recognition of contractual (civic) rights (and thus post-feudal personal autonomy) not only having spurred the growth of a market economy, but also inevitably having led to the establishment of a disadvantaged but consolidated industrial class with a collective interest first powerful enough to ensure its own political emancipation, and secondly dedicated to the political pursuit of social rights to offset its perennial economic inequality. Less a matter of

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[10] Though once again recent displays of muscle by the French judiciary (more particularly, the *Conseil d'état*) would seem to suggest that the French polity/state is no longer so dominant.

[11] T.H. Marshall, (1953) *Citizenship and Social Class*, (Pluto Press: London, 1992).

state and constitutional theory, and more a concrete product of law and the market place, citizenship in the UK is thus generally considered to be a natural and pivotal institutional fulcrum: a mechanism which enables the economic interchange which sustains a market-based society; but which at the same time compensates for its function as a bearer of economic inequality by re-establishing the social parity deemed a pre-requisite for order and cohesion within a social setting.[12]

Leaving aside the not insignificant fact that Marshall was a sociologist rather than philosopher, it is tempting to ascribe the divergence of the apparently generally accepted UK concept of citizenship from its continental and US counterparts (more particularly its relative lack of concern about philosophical issues) to an inherently pragmatic streak in the 'national character;' a realism which equally permeates the UK approach to governmental and social structures. On this reading, the seemingly very concrete institution of industrial citizenship with its emphasis upon the distribution of real power rather than logical perfection, should simply be accepted as the 'deep' concept of citizenship most appropriate to the UK setting. Such prosaic pragmatism apart, however, it will nonetheless be argued here that to do so would not only entail too ready an acceptance of the accuracy of Marshall's analysis, but would also detract attention from the most prescient challenge posed a largely uninvestigated *philosophical* formulation of the normative status of the UK citizen (or more accurately phrased, the constitutional conception of the relationship between the individual and the state) to traditional concepts of state-based citizenship: its apparent deviance from the axiomatic bedrock assumption that citizenship is an institution which at once formally constitutes and limits personal autonomy, legally establishing both individual freedom and indivisible collective sovereignty, and inevitably linking the status and fate of the individual citizen to that of the (national) polity or (Nation) state.

Explaining this point further, however, whereas the notion of industrial citizenship has recently drawn widespread criticism, the debate on the UK citizen has equally begun to lay new emphasis upon the evolutionary significance of philosophical considerations and normative institutions. Predictably, Marshall's failure even to investigate the notion of 'national' community has been highlighted.[13] Far more damagingly, however, political philosophers have also pointed to his incongruent emphasis upon

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[12] *Ibid.*

[13] Turner, 'Introduction to' *Citizenship and Social Theory*, *op cit*, n 1.

the importance of 'rights' in relation to a national society infamous for its rejection of such positive legal expressions, and his concomitant disregard for the 'deep' philosophical foundations of UK society.[14] Likewise, recent sociological research has further demonstrated that historical patterns of political participation in the UK do not coincide either spatially or temporally with those of industrialisation, and has instead laid new weight upon the contribution of normative institutions, such as the rule of law, to the development of political citizenship.[15] Adding to such critiques, however, it might also be suggested here that Marshall's analysis is limited and best understood if seen in the light of the politics and social goals of its era: its core assumption that the use of common national political institutions for the pursuit of what were at heart particularistic (working) class interests would nonetheless serve overall social cohesion (and thus the interests of the entire nation), providing timely normative justification for the unashamedly *collectivist* post-war construction of the British Welfare State. Founded not upon a neutral and generally accepted concept of social justice, but built instead upon a pragmatic vision of 'inevitable' social balance, the notion of industrial citizenship thus nevertheless laid the basis for a new and axiomatic understanding of citizenship rights suited to the politics of its age: the essentially utilitarian goal of social cohesion allowing for the ready translation of a class-based and particularistic demand for social redress into a *universal* and famously inclusive concept of the citizen as a bearer of social as well as political and civic rights.[16]

As such, Marshall's analysis becomes of interest to this study not because it is the definitive statement upon the 'deep' structures of UK citizenship, but since it may be argued to be a litmus not only of the underlying philosophies which have helped to shape relations between Britons and their state, but also of certain of the institutional (or constitutional) facets of UK citizenship: being primarily reflective of the vital role played by a desire for social order in the history of UK citizenship evolution, but also hinting (through its acceptance of a somewhat partisan post-war approach to the national institution of political

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[14] A. Favell, *op cit*, n 7.

[15] Sommers, 'Citizenship and the Place of the Public Sphere: Law Community, and Political Culture in the Transition to Democracy,' (1993) 58:5 *American Sociological Review*.

[16] Not least Marshall himself, cf, T.H. Marshall, *Social Policy* (Hutchison: London, 1975); but perhaps now best represented by the modernised and highly normativised view of Marshall's theory as expounded by Ralph Dahrendorf, cf, *Der moderne soziale Konflikt*, (Deutsche Verlagsanstalt: Stuttgart, 1992).

citizenship) that the interests of the sovereign British State, or polity, are neither logically nor immediately commensurate with those of the national community or individual citizen. By placing Marshall in his own historical context and instead seeking the essence of UK citizenship through a wider historical survey of the nature and contextual origin of the philosophical impulses which have influenced a normative *constitutional* conception of the relationship between the individual Briton and the national community (and/or British State), the following study is thus not merely concerned with ancillary issues such as nationhood and individualism *vs* community. Instead, with surprising and currently very relevant results it also investigates the more fundamental question of how notions of citizenship within the UK have sought to fulfil their supposedly axiomatic function of reconciling the 'natural' autonomy of man with a perceived societal need for one sovereign power.

Recapping briefly, in order to provide for the philosophical fusion of competing Lockean notions of natural individual freedom with Bodinian/Hobbesian concepts of sovereign power, state-based citizenship inextricable links the fate of the individual citizen with that of the constituted state. The constituted state, with its positive formulation of individual rights and politically incorporated citizenry, is thus considered to be the natural ally and expression of personal freedom and social order. Itself no more than a voluntaristic community of citizens, the body politic or state, is not only able through positive law to give concrete shape to otherwise vague natural notions of personal autonomy, but might also deploy its collectively legitimised and undisputed sovereignty to ensure social order through the limitation of individual action. Accordingly, and for good logical reasons, the axiom of state-based citizenship would be unable ever to conceive of the individual citizen 'outside' of or independently from the state. Without doubt, and in contrast to the classical world, the modern citizen's moral existence is not wholly dependent upon the polity or constituted state; civic rights not 'creating' personal autonomy as such, but merely formalising a pre-existing and pre-statal 'natural' liberty.[17] However, by virtue of its positivisation of civic rights and its claim to collective political sovereignty over the social (the

[17] However, brief analogy to the Locke/Rousseau conflict on the 'existence' or 'non-existence' of property is irresistible: Rousseau arguing that property had no existence prior to the establishment of the law of contract and Locke famously supporting a natural view pre-legal view of property as the outcome of 'just bodily labour,' cf, for details, J. Gray, *Liberalisms: Essays in Political Philosophy*, (Routledge: Oxford, 1989).

two functions together being no more than an expression of its monopoly power to 'define' the public/private divide), the constituted state is nonetheless integral to the whole of the individual citizen's status, carving out the private realm in which moral autonomy might be exercised and conversely establishing the breadth of the social sphere in which collective political limits might be placed on individual freedom.

In the United Kingdom, however, it is exactly this form of mutually-enforcing relationship between citizen and state whose presence might be doubted: neither is the Briton politically incorporated within the state, nor is the Briton's individual autonomy formally confirmed by the state through positive and constitutive rights; a unique construction which will be argued to be of particular relevance to a current 'European' debate on citizenship. To be sure, as much of the following analysis demonstrates, a great deal of the distance between individual Briton and British State derives from a complex, and at times simply arcane constitutionalism which, struggling to hold modern normative concepts of voluntaristic and constituted statehood at bay, clings instead to a fanciful—on occasions even stomach-churning—vision of the British State and 'nation' as a cohesive monarchical realm. On the other hand, however, as a careful and contextual examination of the evolution of UK constitutional thought shows, the incongruent status of the individual Briton (an incongruence best highlighted by the on-going debate on whether the Briton in fact be subject or citizen) also derives from far more serious realist perceptions, normative considerations and institutional preoccupations; concerns and structures which may and will be argued to have vital relevance to post-statal and post-national attempts to conceive of citizenship outside of or across the borders of the (Nation) state.

Accordingly, this study is broken down into two section. The first, analyses the reception within UK constitutional thought of notions of individual moral autonomy and (political) sovereignty, and their affect upon constitutional descriptions of the relationship to be established between the Briton and the British State and/or polity. The assumption being that it is this constitutional perception which captures the true 'deep' essence of UK citizenship, two vitally important leitmotifs begin to emerge. First, the Briton is best conceived of as retaining his/her somewhat indistinct 'natural' status, being fully *autonomous* from the British State: not only for the normative reason that UK (or at least, English) constitutional thought was to identify the state/polity (even in its most

restrictive constitutionalised form[18]) as the enemy and not the natural guardian of individual autonomy; but also upon the vital institutional grounds that the 'common law' provides an alternative (non-statal/non-political) means to regulate individual relations within a private sphere which both pre-dates and exists 'outside' the polity or state. Secondly, however, the Briton is similarly distanced from the state, being *represented* rather than incorporated within its polity; this anti-voluntaristic view of the British State, being based upon the sovereignty of its political institutions rather than citizenry, and sustained by an institutional conservatism which conceives of 'political Britons,' in explicitly hierarchical (and historically paternalistic) rather than unitary terms.

The hallmark, at least of the constitutional perception of the British citizen being argued to be 'autonomy and representation,' a second section then attempts briefly to demonstrate that this unusual 'deep' national concept of citizenship is not merely an interesting historical aberration or normative fantasy with no relevance to real events in a modern world. More particularly, with an eye to the problems of governance and citizenship in a post-statal world, the paper argues that the 'deep' concept of UK citizenship contains lessons—both positive and negative—relevant to the evolution of 'European citizenship.'

First, it may be argued that is an obvious blueprint for a necessarily non-statal form of citizenship; a private citizenship which may be governed and regulated by 'common' or 'stateless law.' Secondly, however, (and here the analysis not only strays slightly from the strict constitutionalist path but also grows more speculative) it equally contains serious flaws. More particularly, in the absence of an incorporated polity and/or positively expressed rights, the UK is notable both for its lack of a formally-expressed (aggregative) collective interest and for the absence of a neutral (non-political) mechanism for the balancing of collective against individual interest. Accordingly, in a post-war period, the establishment of collective interest and its limitation appears to be an earthy matter of daily and combatative (party) politics, or the particularist conquering of common political institutions: alternatively, returning to Marshall, the establishment of universal social/industrial citizenship followed upon the 'seizure' of the sovereign power (Parliament) by a post-war Labour Party with a programme (parochial in its inception) of social (class-based) renewal. Considered in its time to be representative of a British 'constitutional

[18] And here the essential divergence from US liberal individualism emerges, *supra* at II B 2.2. b).

moment,'[19] social/industrial citizenship (universal in its application) was nonetheless quickly to begin to wither as opposing Thatcherite forces of atavistic individualism were to scale the political heights: its claim to be a *collective* goal, and its precedence over individual economic interests, lasting only as long as the political predominance of its proponents and their ability to impose it upon society at large.

The message for Europe? That we should institutionalise our 'collective European interest,' turning to notions of incorporation and the formally constituted unitary will? No: the lesson is far more one of how illusionary itself is the concept of aggregative collectivism. Drawing explicitly upon the English pluralists[20] and likewise attempting to shed some light on very recent UK constitutional developments:[21] if national societies are 'federations'[22] of divergent, self-defining and competing private and joint interests , how much more so is a European society. Further, neither states, putative super-states, nor common political institutions can hope ever to embody, establish or sustain a 'substantive' aggregate interest, and would be better placed seeking a 'procedural common good,' mediating between the interests of plural, self defining and private individual citizens and groups of citizens.

II. The Ancien Regime: Rousseau Rejected

As noted, 'deep' philosophical rather than 'realist' perceptions of citizenship have much to do with the normative battle to balance competing notions of individual and empowering autonomy with collective (political) sovereignty. This, however, is a dilemma most commonly tackled within the confines of constitution-making; and the constitutionalist process whereby the state is created, the status of the individual is legally defined and the relationship of the individual with the state is established, furnishes the forum in which philosophical attempts to reconcile autonomy and collective sovereignty may be formally translated into and enshrined in law. Accordingly, the ideas and concepts which were to influence a deep and peculiarly British notion of citizenship were to be woven into UK (or, perhaps better phrased, English) constitutional

[19] To use Ackerman's terms.

[20] Bitterly opposed (at least prior to the 1945 landslide election) to Attlee's collectivist Labour Party, cf, Hirst in *idem* (ed), *The Pluralist Theory of the State*, *op cit*, n 2.

[21] More particularly the 'national' devolution movement and curious incomplete attempts to entrench civic rights, *supra*, at III C.

[22] P. Hirst, *op cit*, n 20, reporting on Laski.

thinking and law during a protracted period of constitutional evolution: beginning prior to the 1600s and reaching maturity only with the establishment of modern institutions and mores of governance during the first half of this Century.

A detailed investigation of this historical period of philosophical and institutional development—or the *Ancien* regime upon which post-war, and politically realistic, concepts of industrial citizenship were to be grafted—nonetheless quickly reveals the extraordinary degree to which UK perceptions of citizenship were to diverge from dominant continental and American models: a divergence perhaps most immediately demonstrated by Edwardian academic uncertainty as to whether the Briton was best to be considered a 'citizen' or a 'subject.'

A. The Citizen Doubted

Though no stranger to the British political stage, the notion of the citizen is wholly new to English common law. At the turn of this Century, this curious circumstance gave rise to furious debate between (what we would today term) political analysts and lawyers.[23] The object of the controversy: the exact status of the individual Briton. In the minds of politicians, schooled in the distribution of real power, it seemed no more than a matter of common sense to conceive of enfranchised and empowered Britons as 'British Citizens.'[24] To lawyers, on the contrary, a national British citizenship was at best a nonsensical concept, at worst a 'rhetorical' phrase into which a wide variety of meanings might be read.[25] As a consequence, the legal community disdained the term citizen and remained true to its own doctrine of monarchical allegiance and subjecthood: whilst one lawyer was to comment that citizenship have no legal meaning beyond the identification of the 'burghers of a municipal corporation' enjoying 'the purely honorary rank of a city,'[26] yet another was to confirm that the 'language and law of England' knew 'of subjects only.'[27]

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[23] Exemplary, *British Citizenship: A Discussion Initiated by E.B. Sargant*, reprinted from the Journal of the Royal Colonial Institute (United Empire), (Longmans, Green & Co: London, 1912).

[24] E. B. Sargant, in, *British Citizenship*, *loc cit*, n 23, 42-59.

[25] J. Westlake (Professor, K.C., L.L.D.), in, *British Citizenship*, *loc cit*, n 23, 9-11.

[26] *Ibid.*

[27] Though regretfully, J.W. Salmond, 'Citizenship and Allegiance' (Part I), [1901] 17 *Law Quarterly Review*, 270-282, at 272.

1. Definitional Divergence

Initially, at least, it may argued that the root cause of the conflict lay in the differing meanings which each discipline (political and legal) ascribed to the concept of national citizenship. Political commentators appeared to take a minimalist view of the citizen, simply equating the term with 'a right of voting.'[28] Thus, a specifically 'national' citizenship was argued logically to have evolved in simple step with the development of an effective national political assembly and the progressive widening of the franchise into a nation-wide institution.[29] In this pragmatic view, the heart of citizenship lay in the act of 'free political association,' and 'so long as there was a deliberative assembly which in some fashion represented the nation as a whole,'[30] it clearly made sense to envision of the British as a nation of political citizens associating freely via their representatives in the House of Commons.

Lawyers on the other hand, were guided by a more comprehensive and normative understanding of the concept of national citizenship. Seemingly directly influenced by purist classical notions of the citizen,[31] legal commentators insisted upon breaking down national citizenship into two constitutive elements: first, arguing that it needs must encompass a tangible and exclusionary notion of nationhood or national belonging; and secondly, claiming that it need also positively formalise or 'incorporate' the national process of political association, so creating additional 'horizontal' bonds of belonging between individual citizens. When measured against these more rigorous of normative yardsticks, the status of the individual Briton, increasingly inclusive suffrage notwithstanding, seemed to differ radically from that of national citizen.

To begin the notions of nationhood or national belonging. In 1900 as today, the United Kingdom eschewed any 'deep' concepts of the Nation.[32] A pre-political conception of nationhood—or in then current terms, the idea that:

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[28] 'Editorial Comment,' in, *British Citizenship*, *loc cit*, n 23, 9.

[29] E. B. Sargant, in, *British Citizenship*, *loc cit*, n 23, 42-59.

[30] *Ibid.*

[31] Most notably and probably attributable to a training in Roman law, J.W. Salmond, 'Citizenship and Allegiance' (Part I), *loc cit*, n 27, and J.W. Salmond, 'Citizenship and Allegiance' (Part II), [1902] 17 *Law Quarterly Review*, 49-63.

[32] A. Favell, 'Philosophies of Integration: The Theory and Practice of Ethnic Minority Politics in France and Germany,' *op cit*, n 7.

'[A] Nation is a society of men united by common blood and descent, and by the various subsidiary bonds incidental thereto, such as common speech, religion, and manners'[33]

in any case seemed singularly inappropriate within a political union made up of various Celtic and Anglo-Saxon ethnic groupings. Equally, however, more philosophical bases for national belonging comparable with Rousseau's 'civic religion' of the Nation, had similarly passed Britain by.[34] Instead, the 'nationality' element within British law was still supplied by the feudal, and decidedly 'nation-neutral' common law doctrine of monarchical allegiance which labelled as British Subjects all those who perchance were born within the King's dominions. Paying no attention to the race, religion, creed or philosophical attitudes of those from whom allegiance to the Crown was demanded, the doctrine's unqualified rule of *ius soli* established an inclusionary view of Britishness which seemed to derive solely from the physical accident of residence within British territories. As one lawyer was to argue, this gave rise to a purely 'territorial union' rather than higher 'personal union' between Britons and the British State,[35] so mitigating both against the notion of national belonging and against that of a 'nationally-flavoured' citizenship.

Secondly, however, there was also the small matter of the non-incorporation of the British body politic. In legal minds, the essence of citizenship lay in the Roman conception of the state 'as an association of fellow-members, incorporated into one body politic or *respublica.*'[36] The strength of this incorporated community had derived from the fact that 'Roman citizens were men bound to one another by the personal bond of fellow-membership of one body.'[37] Horizontal ties were therefore established between the members of the citizenry: ties upon which mutual duties, rights and obligations might be built. Within the United Kingdom, however, a 'feudal' monarchy had displaced corporatist notions of the *Res publica*, severed horizontal bonds, and instead imposed hierarchical ties of loyalty and allegiance between the individual Briton and the sovereign. The notion of the state as an incorporated community was thus to be forever unknown to English law with the notable consequence that there be no body or *Res publica* of which Britons might be members.

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[33] J.W. Salmond, 'Citizenship and Allegiance' (Part I), *loc cit*, n 27, at 272.

[34] D. Heater, *Citizenship: The Civic Ideal in World History and Politics*, (Longmann: London, 1990)

[35] J.W. Salmond, 'Citizenship and Allegiance' (Part I), *loc cit*, n 27.

[36] J.W. Salmond, 'Citizenship and Allegiance' (Part II), *loc cit*, n 31.

[37] *Ibid.*

Once again, the common law doctrine of allegiance had ensured that British Subjects were 'men bound, not to one another, but to a common superior.' The law recognised the Crown as a corporation, but Britons, the 'aggregate of the subjects of the Crown, [had] no legal identity or personality.' In law at least, there was no *populus Britannicus* analogous with the *populus Romanus* of antiquity.[38] Thinking rigidly (as lawyers are wont to do), this absence of any formal ties between individual Britons then surely precluded that most fundamental of elements within citizenship: the idea that it constitute a tangible community of common interest, or a notion of fellow-membership upon which mutual duties, rights and obligations might be built.

2. *Constitutional Conflict: Legal Subjects vs Political Citizens*

Vitally, however, the discord between lawyers and political analysts was not merely a product of the differing views which each group held of the 'true' nature of national citizenship. Instead, or so it may be argued, such conflict ultimately derived from two very varied readings of the exact nature of the British Constitution, and of the position of the individual Briton in relation to that Constitution. In explanation: the abiding refusal to commit the UK's Constitution to paper, and/or to transform its scheme of unwritten mores, rules and practices into a coherent, visible and positive body of norms, is often argued to have contributed to the historical stability of the British State. Alternatively, the Constitution's genius is said to lie in its inherent flexibility. Radical alterations in the social and political make-up of the United Kingdom might so be simply accommodated within the structures of this living body of law, dispensing with the need for those more disruptive of revolutionary transformations so often witnessed on the continent.

Advantageous as this chameleon-like character may be, however, it may nonetheless also present certain difficulties of its own. In particular, the elasticity of the UK Constitution and its heavy reliance upon 'formulaic reverence' dictates that there have been correspondingly few clear breaks with the past.[39] Consequently, whilst new political and philosophical ideas may have found their way into this unwritten document, the lack of momentous founding moments, or comprehensive overhauls of the Constitution, has inevitably led to a considerable amount of conceptual

[38] *Ibid.*

[39] R. Bellamy/D. Castiglione, 'The Constitution of Europe,' Manuscript, University of Exeter, 1993.

overlapping with newer ideas often being called upon to co-exist with the old. In the common sense words of Thomas Paine, this determines that the Constitution be 'exceedingly complex.' In the real world of constitutional politics, however, it also dictates that there invariably be a degree of tension between often inconsistent and sometimes competing constitutional principles. When seen in this light, the turn of the Century dispute between lawyers and political commentators accordingly takes on an added hue becoming less of a matter of definitional divergence, and more a case of constitutional conflict between the supporters of the ancient constitutional principle of monarchical subjecthood and the champions of a newer ideal of political citizenship. In short: the legal subject *vs* the political citizen.

2.1. The Superior Status of the Legal Subject?

In explanation: at the heart of such constitutional conflict, lay a fundamental and double-sided disagreement; first, as to where the 'allegiance of the individual Briton might be said to lie; and secondly, as to the particular consequences of such allegiance. In legal analysis, allegiance or 'ligeance' was a principle dating from the early medieval ages which had been given a firm constitutional footing by the celebrated *Calvin's Case* of 1608.[40] It was a hierarchical tie which created the status of British subject and concurrently established mutual and indissoluble bonds of service and loyalty between the individual subject and the British Crown.[41] Further, however, allegiance-based subjecthood was an organic status entailing substantive rights and duties which were naturally superior to democratically determined rights or duties of political citizenship. Vitally, this latter idea was to be firmly ensconced in case-law, being most powerfully enunciated in the somewhat surprising Judgement of *Murray* v *Parkes*.[42]

A decision that Mr Parkes, a citizen of the Irish (Free) State, be a British Subject by simple virtue of his birth within the King's dominions and hence liable for British military service, was thus notably accompanied by

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[40] (1608) 7 Co. Rep.

[41] *Calvin's Case* (1608) 7 Co. Rep., establishing a distinctly personal tie of allegiance between the Briton and the individual Monarch, with on-going allegiance secured by the maxim 'the King never dies,' *Isaacson* v *Durant* (Stepney Election Petition) (1886) 17 Q.B.D. 54, rationalising this relationship somewhat, establishing allegiance between the Briton and the (executive) office of the crown.

[42] [1942] 2 K. B., 123-137.

the illuminating phrase that Mr Parkes' British subjecthood be 'the superior political status,' his Irish citizenship, a mere 'municipal standing' to which various minor rights and obligations attached.[43] The Judgement, however, was no more than an inevitable consequence of the feudal doctrine that a natural born subject of the King might never sever his bond of fealty or renounce his allegiance to the British Crown: *nemo potest exuere patriam.* Though the doctrine admitted of the possibility that a subject might have two lords, only one—the British King—was a 'liege' lord who might by virtue of this elevated position claim the superior bond of allegiance: *unus et idem duorum dominorum homo ligius esse non potest.*[44] Therefore, while Mr Parkes as an Irish citizen owed a degree of fealty to the newly constituted Irish Republic, such loyalty could not of itself[45] sever his allegiance to the British Crown. Equally, this tie of allegiance was necessarily stronger than that owed to the Irish Republic.

Whilst undoubtedly a relic of the medieval age, the longevity of the doctrine of monarchical allegiance nonetheless appeared to have the very modern effect of dictating that although British subjects might engage in free political association—and even create a democratic state with 'sovereign' claims over its own citizens—the British Crown might nonetheless make a prior and enduring claim to the individual citizen-subject's loyalty: personal organic allegiance appearing to override all democratically determined rights and duties.

2.2. The Predominance of the Political Citizen?

To political analysts, however, allegiance was no longer a matter of a bond of personal loyalty between the individual Briton and the Crown. Rather, in this view, the doctrine had not escaped the effects of a fundamental shift in the British Constitution which had seen real political power move away from the person of the monarch to the body of the House of Commons. As electors, Britons shared in such power, and

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[43] Viscount Caldecote C.J., at 130, confirming Lord Westbury, *Udny* v *Udny* (1896) L. R. 1 H. L. Sc. 441, 457.

[44] J.W. Salmond, 'Citizenship and Allegiance' (Part II), *loc cit*, n 31, at 51, confirming Forsyth's Cases and Opinions in Constitutional Law.

[45] Allegiance might nonetheless be severed if two conditions be satisfied. First, the Crown consent to a severance. Secondly, the former subject take some action that show that he no longer consider himself bound by the tie of allegiance, cf, *Udny* v *Udny* (1896) L. R. 1 H. L. Sc. 441, dealing with problems arising from the loss of the N. American colonies.

accordingly their allegiance now centred upon Parliament.[46] With this shift in loyalty, the rights and duties of the political citizen were now deemed to take precedence over those of the legal subject.

Admittedly, however, the process whereby the political citizen had gained predominance over the legal subject, had been a lengthy one.[47] In explanation: the modern citizen was said directly to derive from the citizens and burgesses of the medieval Cities and Boroughs which through grant of Royal Charter had regained a measure of the self-governance and autonomy they had anciently enjoyed within the Roman Empire.[48] Although such egalitarian centres of political association were to be all but obliterated under a Saxon hegemony which preferred to emphasise its own brand of particularistic tribal allegiance; the severed link to the classical notion of egalitarian and democratic city-based citizenship was nevertheless to be re-established in the early middle ages by virtue of Norman invasion and the growing influence of the consolidated medieval Church. Both Law French[49] and Canon Law,[50] were thus to play their part in re-introducing classical notions of incorporated cities and the citizen into England.[51] As a consequence, life was breathed into the few remaining centres of city-based citizenship,[52] and, albeit in shadow form, the citizen of antiquity was to live on throughout English history. Though forever vulnerable to monarchical efforts to manipulate and repress Charters, autonomous cities and boroughs nonetheless provided a prototype arena

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[46] E. B. Sargant, in, British Citizenship, *loc cit*, n 23, 42-59.

[47] *Ibid.*

[48] *Ibid.*

[49] Noting the general influence of Norman French ideas on English legal thought, R. Zimmermann, 'Historische Verbindungen zwischen civil law und common law,' in XXXX.

[50] The Church's pivotal role in the re-introduction of classical citizenship into England being best demonstrated by the canon law dictate that a city with a Cathedral might demand of right a Royal Charter giving it a degree of automatic independence from Royal administration.

[51] The rediscovered *Corpus Iuris Civilis* which is generally attributed with re-introducing classical concepts of citizenship into medieval Europe, cf, P. Riesenberg, *Citizenship in the Western Tradition*, *op cit*, n 3, arguably finding its way into England via the civilian legal systems of law french and canon law, rather than the heavily Saxon influenced common law.

[52] Most notably London which managed to maintain a semi-autonomous form of self-government throughout Saxon and Norman occupation regaining its official status as a corporation by Royal Charter in 1215, cf, F. Barker/P. Jackson, *London: 2000 Years of a City and its People* (MacMillan: London, 1983).

for democratic participation. The election of Mayors, Alderman and Guild officers thus furnished the freemen or citizens of these enclaves with the opportunity directly to influence the laws under which they were to live, and so to develop an effective form of municipal citizenship.

Importantly, as Norman and then English Kings consolidated their rule, and were able to enforce a feudal notion of monarchical subjecthood throughout the Realm, the citizens and burgesses of the cities and boroughs were to develop a dual status as citizens and subjects. When acting within the terms of the Royal Charters, their status as citizen or burgess was uppermost: the rights and duties of the citizen—autonomously determined within the cities—taking precedence over the rights and duties of the subject. Without the limits of Royal concessions, however, citizens came under the direct control of the King's law and their rights and duties were accordingly those of the monarchical subject.[53]

With the appointment of representatives from the cities and Boroughs to the first Long Parliament, however, the autonomous sphere of citizen's rights and duties encroached into the national arena and began to compete directly with that of the subject. Though at first such representatives had a very limited role, merely consulting with the King, their alliance with the representative Knights of the Shire to form the Commons was argued to have proven to be decisive; on the one hand, contributing to the re-introduction of popular control over civic administration within the shires;[54] and on the other, establishing a popular and national assembly with sufficient power to influence the King in his law-making. Through their representatives, citizens and burgesses throughout the country now possessed a degree of national political power, or a limited national citizenship to complement their more comprehensive municipal citizenship. This power might so further be exercised as to diminish obligations of personal allegiance to the King. Whilst the Crown retained its wide-ranging prerogatives, the obligations of personal allegiance might never be wholly precluded. Equally, however, the existence of a popular national assembly similarly ensured that such feudal obligations might

[53] Alternatively medieval citizenship was a matter of the 'purchase of a sphere, secured from the King, in which to conduct private relations with other citizens,' *British Citizenship*, *op cit*, n 23.

[54] E. B. Sargant, in; *British Citizenship*, *loc cit*, n 23, 50. For the vital significance of this re-introduction of country-wide popular and decentralised administration upon the general development of citizenship participation in the UK, cf, M. Sommers, 'Citizenship and the Place of the Public Sphere: Law Community, and Political Culture in the Transition to Democracy,' *loc cit*, n 15.

never wholly override those of a national self-determining citizenship. In short: a form of equilibrium was established between two powers, the Crown and Parliament, a balance which was mirrored by the evolution of a dual national status for the Briton. On the one hand, he was a legal subject under the direct influence of the Crown, or the King's law together with the rights and duties which it entailed. On the other, a national political citizen, playing his own part in the development of a series of deliberatively determined rights and duties.

Moving on through history, however, the balance of political power was slowly to tilt in the Commons and the citizen's favour. In particular, the civil war, interregnum, restoration, glorious revolution and the 1701 Acts of Settlement, were drastically to reduce the monarchical prerogative, and to relocate it in the hands of a parliamentary executive. Political power thus shifted towards the Commons. Over the following Centuries, classic restatements of the Constitution by Blackstone, Bagehot and Dicey, contributed to the continuous empowerment of this body. At the same time, the gradual widening of the franchise and the evolution of effective party machines similarly ensured than an ever larger number of Britons be represented by its members, and that the UK as whole move towards mass democratic participation. With the hard-fought for Reform Acts of 1832 and 1867, the last vestiges of privileged efforts to manipulate local and national political processes were finally swept aside. The Rotten Boroughs were no more and the political map of Britain was now characterised by a dual system of fair, effective and participatory local administration, and empowered and democratically representative national government. Most male Britons were now municipal and national citizens, playing their part both in local civic administration and in the election of representatives to the Commons, the most powerful political body in the Realm. In short: democratically determined law had prevailed above monarchical dictate. Accordingly, 'the national rights and duties of the citizen ultimately took precedence of the rights and duties of the subject,' and consequently, 'an actual transfer of allegiance' was argued finally to have been secured.[55]

3. The Issues Restated

At one level, it is possible to rationalise this turn of the century debate on the status of the individual Briton, boiling it down to a fundamental disagreement between lawyers and political scientists about the distribution and status of formerly monarchical prerogatives. Clearly, both

[55] E. B. Sargant, in, *British Citizenship*, *loc cit*, n 23, 51.

Parliament and the Courts exercised such prerogatives. The political community's assertion that the Briton be a citizen rather than a subject, however, derived from the fact the prerogatives of the common law—and thus the status of British subject—were merely residual, and might be exercised only to the extent that that Parliament—and the British citizen—tolerated their use. Alternatively, the Briton now enjoyed an autonomous sphere so large that he might, if he so wished, simply set his status as British subject aside.

Such theoretical considerations aside, the fact nonetheless remains that the Political Community continued to tolerate the operations of the common law outside the sphere of democratically determined statute law, and in particular, took no action to set aside the doctrine of allegiance and the notion of British subjecthood. The Briton was both citizen and subject. In short, a complex, contradictory and inconclusive situation which nonetheless proves illuminating for this purposes of this study: first, clearly highlighting the difficulties which any attempt to capture the 'essence' of UK citizenship may face; but secondly, also providing a pointer to the major issues which have characterised British debate upon the position of the Briton.

3.1. Subjects and Citizens: A Dual Status

To begin first, however, with the difficulties. Primary amongst these, is the fact that within the UK setting, the terms 'citizen' and 'subject' appear to diverge from their more commonly accepted meanings. The classical and oft-reiterated dictum that the word subject simply connote a status of subjection to a single sovereign power, whilst the status of citizen entail a share in that same power,[56] is seemingly far too simple a construct to capture the nuances of the British case. Whilst Frenchmen in 1900 were simultaneously subjects and citizens of the French state, Edwardian Britons were subjects of the British Crown, but citizens of the British Parliament: the two distinct statuses relating to different constitutional organs. Each was thus educed from its own legitimising source, was a substantive status and carried its own peculiar set of rights and duties.

The legal subject was a creature of the 'common law.' As such, it derived neither from democratic process nor from the higher principles of a constitution, but from a monarchical authority deemed to exist prior to and independently from the modern institutions of the British State. Neither

[56] Preuß, 'Two Challenges to Modern Citizenship,' *loc cit*, n 5.

was common law a law legitimated through conventional democratic process; nor was it normatively derived from a popular constitutive act. Instead, in a historical development which was to infuriate generations of British philosophical thinkers in turn,[57] common law Judges had perpetuated and promulgated the ancient principles of an equally antiquated legal system into a modern and democratic age. Whilst by 1900 a considerable proportion of law-making in the UK was effected by statute and might so be directly traceable to the democratic will of the British people, large areas of law nevertheless remained within the purview of the Judges and were thus impervious to this form of popular pressure. Accordingly, subjecthood appeared to be a status over which individual Britons had little conventional political control.

Equally, however, the status of subject was a significant one. First, subjecthood supplied the missing nationality element within the British Constitution. Through the doctrine of allegiance it determined who might be considered to 'belong' to the British State. Secondly, it established a series of positive duties which were owed by Britons to the British State.[58] Finally, however, it also contained one vitally significant right—that of the right to the protection of the King's or common law.[59] In other words, or so it will be argued below, subjecthood was the vital gateway to the enjoyment of the not-inconsiderable civic rights and notions of procedural justice which the common law—however undemocratically—had established within its own jurisdiction.

Citizenship on the contrary, was a political rather than legal status, and was accordingly intimately entwined with the national democratic process. Simply stated, national citizens shared in the exercise of the legislative powers of parliament. Their existence legitimised by the national democratic process, citizens possessed one major right, that of participation in national political processes. Unlike French citizens, British citizens were not formally recognised by higher law and the extent of citizenship was consequently determined by simple legislative fiat rather than constitutional principle. This lack of constitutional incorporation, however, did not detract from the fact that citizen-electors, unlike subjects,

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[57] The champion of the utilitarians, Jeremy Bentham dismissing the common law as 'sham law,' 'a thing merely imaginary' and as 'power everywhere arbitrary,' cf., *A Comment on the Commentaries*, (Scentia: Aelen, 1976).

[58] The most far-reaching of these being the duty to desist from treasonable behaviour.

[59] M. Everson, *To the Constitutional Position of the Citizen of the United Kingdom*,' (ZERP-Diskussionspapier 7/93, Bremen).

were 'autonomous' actors who through a process of political association enjoyed a measure of self-determination.[60] In common with the citizens of the medieval cities and boroughs, modern national citizens thus enjoyed an autonomous sphere of political action, free from the influence of the Crown (or the common law), in which they might themselves determine the character of the relations maintained between individual Britons.

At one simple level, the dual status of citizen and subject creates certain analytical difficulties. Is the earnest investigator of UK citizenship to simply ignore such distinctions, counting the rights which attached to the ancient status of subject as more modern rights of citizenship? At yet another, however, the sometimes discordant relationship between citizenship and subjecthood,[61] provides a first indication of one of the major issues to characterise the citizenship debate in the UK, its subtle variation upon the much discussed theme of the self-determining political community vs individual rights.

3.2. The Self-Determining Political Community vs Individual Rights

Between ancient and modern forms of citizenship—or between the 'first' and 'second' citizenship[62]—there lie two thousand years and an apparent contradiction. Classical citizenship was predicated wholly upon the republic. Citizenship grew out of and was expressed through the act of political association. Beyond such communal political expression, however, the individual citizen had no particular identity. The *polis* and not the individual citizen lay at the centre of the classical universal. As a consequence, the *polis*' political power was unlimited. The self-determining political community was just that: a community which might rule on all aspects of communal or individual life.

Modern citizenship, on the contrary, was rooted in the constitutional recognition of the identity and humanity of the individual citizen.[63] Dating from the revolutionary French 'Declaration of the Rights of the Citizen and

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[60] D. Heater/D. Oliver, *The Foundations of Citizenship*, (Harvester Wheatsheaf: London 1994).

[61] Cf., *Murray* v *Parkes*, *loc cit*, n 42.

[62] P. Riesenberg, *Citizenship in the Western Tradition*, *op cit*, n 3.

[63] Preuß, 'Two Challenges to Modern Citizenship,' *loc cit*, n 5.

of Man,'[64] the second citizenship was consequently an unashamedly individualistic notion. The recognition in higher law that the individual be a free born being bequeathed with equal civic rights, had been commensurate with a statement that individuals be sufficiently worthy to determine their own destiny. Armed with such a constitutional confirmation of personal autonomy, the individual citizen might then engage in the act of political association in an attempt actively to shape his own fate. In other words, whilst in the classical construction the citizen existed purely by virtue of common political interchange; in modern philosophy, the existence of an autonomous and rights-bearing citizen was instead a vital pre-condition for political association.

This shift in emphasis from political communality to rights-based individualism accordingly had a negative impact upon the powers of the political community. No longer was the polity to be regarded as fully self-determining. Rather, it need be constitutionally restrained: inviolate civic rights protecting and guaranteeing the individual citizen's autonomous and politically constitutive identity. This constitutional restraint of the polity has consequently provided the general discussion on citizenship with some of its most enduring themes. Which individual rights need be protected from political interference? In how far should individual interests prevail above those of the political community? The United Kingdom is similarly no stranger to such debate. The development of the dual status of political citizen and legal subject, however, has nevertheless historically determined that this debate be framed in terms peculiar to the UK.

As famously noted,[65] civic rights in England were not the product of a revolutionary constitution, but were the work of 17th and 18th Century jurisprudence. In slowly and meticulously supplementing ancient natural and procedural rights with newer economic and contractual rights,[66] the Judges elevated the feudal vassal into an autonomous subject of the common law. In so doing, however, they similarly unleashed the creative capacities of individual Britons and so laid the foundations for later demands for rights of political citizenship.[67] Alternatively, the political citizen was to grow out of the autonomous subject.

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[64] Preuß, 'Zum verfassungstheoretischen Begriff des Staatsbürgers in der modernen Gesellschaft,' in *idem* (ed), *Saatsbürgerschaft und Zuwanderung*, (ZERP-Diskussionspapier 5/93, Bremen), 21-38.

[65] Again, most famously by, T.H. Marshall, *op cit*, n 11.

[66] The most famous of these being the writ of as *Habeas Corpus*.

[67] T. H. Marshall, *op cit*, n 11.

Vitally, however, in the UK setting rights of subjecthood were never simply to act as natural restraints upon the self-determining polity. Judges had no power to review Statue law. Rather, Parliament's superior legislative power dictated that there invariably be a degree of tension between the political citizenry and a law which upheld the rights of the subject. Indeed, if it so wished the political community might simply set the subject's rights aside. As Judge-made law, such civic rights did not carry the natural authority of constitutionally secured rights. Equally, however, as products of a law which derived its authority from judicial deliberation and a pre-democratic notion of monarchical rule, they would inevitably be the object of some suspicion in political circles: were Judges merely the neutral arbiters of the individual's good, or were they the handmaidens of particularistic class or economic interests.[68]

Speaking formally, the UK' s progression towards democracy seemed thus to have taken Britain back to the classical notion of a wholly self-determining *polis*. In common with France, the United Kingdom had evolved a comprehensive set of individual liberties conducive to the growth of inclusive political community.[69] Unlike the French Republic, however, the UK had not enshrined such rights in higher law, leaving them vulnerable to the very political community whose growth they had precipitated. Returning from the theoretical to the factual, however, as many glowing evocations to the 'Englishman's love of liberty' were to confirm, the political community nonetheless did hold a degree of respect for liberties, the rights of the subject being rarely if ever encroached upon.

In other words, further limiting factors seemed to be in play. The political community did not behave as a wholly self-determining unit. Instead it appeared to display a remarkable degree of self-restraint, leaving the subject's rights in tact. This then provides one of the major questions to be tackled in relation to the position of the Briton which mechanism(s) regulated relations between the individual Briton subjects and the British political community?

3.3. Community vs Individualism

The use of the term political community in the UK setting raises, however. raises a further point of interest. Simply stated, the failure to

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[68] Cf., Harald Laski, *Parliamentary Government in England*, (Allen & Unwin: London, 1938).

[69] The Declaration of the Rights of Man and the Citizen being modelled on the 1869 Bill of Rights.

incorporate the polity within the British state, or to establish horizontal bonds of belonging between individual citizens, necessarily places a question mark over the notion that the UK citizenry constituted a 'community.'

As noted, the progression to citizenship had determined than an ever growing number of Britons be politically 'autonomous.'[70] Armed with the franchise, a not inconsiderable portion of the population was now emancipated from the direct control of others, and might so pursue its own perceived interests through the political process. With such an evolution, however, a strong streak of individualism seemed to have entered the United Kingdom. In common with certain of its continental neighbours, Britain was thus confronted with the perennial problem of maintaining internal social cohesion amongst a polity of diverse and possibly self-interested members, and of persuading the citizenry to exercise its new-found powers with due respect for each other and for the interests of the political community as a whole. Unlike its European counterparts, however, the UK continued to eschew any positive normative commitments to republicanism. The polity was not to be incorporated. There existed no formal recognition of mutual rights or reciprocal duties. Formally speaking, the polity remained no more than a loose collection of individuals.[71]

In short, however, the United Kingdom seemed to lack formal instruments of internal cohesion. The republic was not a feature of British law. This, however, raises the second question in relation to citizenship development in the United Kingdom: what if any mechanisms regulated

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[70] Cf., D. Heater/D. Oliver, *The Foundations of Citizenship*, *op cit*, n 60.

[71] Equally, however, Britain appeared in certain respects at least to be insulated from the growing European trend of nationalism. In an age when national consolidation was seen as an imperative and had worked its way into most national concepts of citizenship via exclusive nationality law, the UK retained its inclusive view of Britishness, rejecting international pressure to define who were its nationals—most particularly, continuing to resist the demands of the old established (and white) Dominions, that a clear scheme of nationality be established within the British Empire, with the dominions gaining the right autonomously to identify their own citizens/nationals, cf., A. Nicol/A. Dummet, *Citizens, Subjects, Aliens and Others*, (Weidenfeld and Nicolson: London, 1990) a demand often attributed the 'racist' desire of Dominions such as Canada and South Africa to deny entry to (black) British subjects from the Colonies. 'Deep' concepts of the nation had not evolved, and consequently the notion of a 'national community' appeared to be as elusive as that of the 'political community'

relations between individual Britons, thus providing for a degree of social and political national cohesion?

3.4. Hierarchy vs Egalitarianism

As noted, citizenship is most commonly seen as being a matter of the progression from 'the hierarchical to the horizontal, so that fixed positions of a formal status system begin to dissolve under the impact of universalistic democratic rights of citizenship.'[72] The natural enemy of the citizen was thus the aristocrat of primogeniture whose claims to social and political dominance were based on no more than an accident of birth and a feudal view of society which saw each individual tied to his allotted rung in a hierarchical ladder of power. Alternatively, in Paine's vivid prose, citizenship was a direct challenge to 'aristocratic governments founded in conquest' and the 'base idea of man having property in man.' Instead, universalistic rights of citizenship provided an opposing and constitutive view of man which saw 'every individual born equal in rights with his contemporary.'[73] Men of equal rank might beak down hierarchy and establish new and egalitarian modes of social and political interaction. In other words, one of the primary elements within citizenship is the fact that it be founded upon horizontal and not hierarchical ties between individuals.

At the turn of the Century, English law was no stranger to the notion of egalitarianism. Most strikingly, civic rights attached to all individual Britons regardless of their personal status. A contradiction nevertheless arose in that beyond the sphere of rights, the law continued to formulate relations between the Briton and the British State in explicitly hierarchical terms. This, however was to occur in two ways. Most strikingly, the notion of subjecthood, being predicated upon ancient feudal notions of monarchical hierarchy, perforce dictated that each individual Briton stand in a hierarchical relationship to the Crown. Similarly, however, though somewhat less explicitly, the continued refusal of the Parliament formally to incorporate the political citizen within the British state, seemed likewise to place the political citizen on a lower footing than that Parliament which supposedly represented his will. In other words, the claim of the political Community that the Briton be a citizen and not a subject was flawed in one very fundamental aspect: the absence of higher laws and the primary constitutional tenet which located sovereign power not in the hands of the

[72] B.S. Turner, *Citizenship and Capitalism*, (Unwin Hyman: London 1985).

[73] The Rights of Man, *The Thomas Paine Reader*, (Penguin: London 1987), 201-364.

people, but in the Sovereign in Parliament, determined that the franchise never be fully secure from predatory parliamentary attentions. The citizen's status thus being dependent upon simple legislative fiat rather than constitutional prescription, his very existence was thus always to be subject and subordinate to the whims of his representatives.[74]

Accordingly, a third question is raised as to citizenship evolution in the United Kingdom. Were such hierarchical ties merely the constitutional remnants of outmoded and ancient systems of government? Alternatively, did the position of the individual Briton once again diverge from more common paradigms of citizenship, with hierarchy continuing to play a significant role in political life?

B. The Constitutional Position of the Briton Re-Assessed

Given the issues raised by the discussion of whether the turn-of-the Century Briton be citizen or subject, the investigation now moves on more closely to consider the questions of subjecthood *vs* citizenship, individualism *vs* community, and hierarchy *vs* egalitarianism through a historical re-appraisal of UK (English) constitutional thought on the status of the individual Briton and the relationship of individuals to the British State. In particular, however, the analysis attempts to pinpoint exactly how the law received successive philosophical notions of individual autonomy and collective (state) sovereignty and subsequently incorporated them within the formal institutions of British social and political life—the assumption being that it was this exercise which gave rise to a peculiar and 'deep' concept of the UK citizen.

In this latter regard, however, it is worth noting at the outset that UK legal and constitutional evolution seems to have followed a highly idiosyncratic path; and in particular—this likewise being a facet of the UK's abiding philosophical preference for 'negative' rather than 'positive' liberalism—diverged from its continental and American counterparts by virtue of its enduring refusal ever to link or subsume 'naturally-derived' principles of individual autonomy with or within more positive state

[74] Concerns that Parliament lie above the people remaining topical to this day with Charter 88, for example, claiming that the events of 1688 merely 'shifted the absolute power of the Monarch into the hands of the parliamentary oligarchy,' and furthermore arguing that this failure constutionally to incorporate the British citizen within the State was to enable the Thatcher 'government to discipline British society to its own ends.' 'Charter 88,' in, G. Andrews (ed.) *Citizenship* (Lawrence & Wishart: London, 1991).

constructs. Accordingly, the study concentrates on three particularly weighty and characteristic moments in UK constitutional history. The first, *Calvin's case*, clearly demonstrating that notions of individual autonomy within the UK Constitution derived from the same natural law roots as did those of American and French legal thinking. The second, the publication of Blackstone's *Commentaries*; a body of legal scholarship which marks the beginnings of UK constitutional particularism—resisting the then current revolutionary trend to wed natural law to the positive law of the state, so preserving the individual Briton's pre-statal identity. And the third, the publication of Dicey's law of the Constitution; a work characteristic of a peculiarly British (English) form of legal positivism which with its roots in utilitarianism once again sets UK apart—being more concerned with assertion of the sovereignty of political institutions than with that of the British people.

1. Calvin's Case

Calvin's case is further chosen as the first moment in the evolution of a distinct constitutional status for the Briton for two reasons: first, since it was the source of the doctrine of allegiance and thus initiated the view of the Briton as a monarchical subject which was to dominate the perception of the individual Briton up until 1948; but secondly, since it also offers an authentic summary of the early 15th Century view of the nature of the British state and the relation of the individual Briton to that State.

1.2. Subjecthood as a Feudal Construction

In its origins a feudal doctrine derived from the Norman habit of inextricably binding vassals to their lords, allegiance was definitively laid down as a tenet of English law in the momentous *Calvin's Case* of 1608.[75] Lord Coke presiding, took this opportunity to enunciate 'the pure milk of the common law doctrine of allegiance,'[76] so finally formalising a general principle of law which dated as far back as the 13th Century.[77] Accordingly, in much the same manner as all those born upon the land of a feudal Baron were placed under an obligation of fidelity and obedience to their Lord, so all born within the dominion of the King were to become *ad fidem regis*—in the faith of the Sovereign—and so to owe him

[75] (1608) 7 Co. Rep.

[76] J. Mervyn Jones, *British Nationality Law and Practice*, (OUP: Oxford, 1947), 41.

[77] P. Brand, *The Making of the Common Law*, (Hambledon: London 1992).

unquestioning loyalty. Equally, however, just as the fidelity and obedience of feudal vassals had its counterpart in a baronial duty to furnish 'protection and guardianship,'[78] the King too was obliged not only to 'govern and protect' his subjects, but also 'to maintain and serve them.'[79]

With this choice of a feudal idiom to describe the status of the individual Briton, the organicism within notions of 'Britishness' was born. In inextricably linking the Briton to land, and in particular to the King's land, British subjecthood was to develop its distinctly earthly feel: on the one hand, resulting in a perception that Britishness be a mere matter of an accidental territorial union between the individual Briton and the British state;[80] and on the other, raising a presumption that in the absence of 'personal' ties between Briton and state, the British subject be just that—an individual, accidentally and irrevocably subject to the laws of the state, and thus with little or no interest either in the fate of his fellow subjects or the workings of government.[81]

1.3. Subjecthood as a Hobbesian Construction?

Though most often viewed purely as a feudal construction, and thus obviously lacking that pragmatic element of post-feudal paction so integral to *Leviathan*, it is nonetheless tempting to conclude that the doctrine of allegiance and the status of subjecthood, indicate that the institutional thinking of the common law simply coalesce with the Hobbesian philosophical tenet that life in a state of nature be brutish and short, and that some undisputed authority be necessary to imitate the Divine moral order in which the individual might have a better chance of survival. Pre-dating *Leviathan*, the doctrine of allegiance nonetheless seems to reproduce its underlying themes playing upon the individual Briton's desire for succour and guardianship: offering protection and demanding in return that the subject unquestioningly submit to a sovereign authority whose primary duty it was to maintain moral order in society.

On such a reading, it would seem logical to conclude that the sole basis of the British Subject's respect for the British State be that most primitive of conceptions, the desire for self-preservation. In defending the state's borders and ensuring the moral order within those borders, the King's law

[78] J.W. Salmond, 'Citizenship and Allegiance' (Part II), *loc cit*, n 31.

[79] Lord Coke in *Calvin's Case*.

[80] J.W. Salmond, 'Citizenship and Allegiance' (Part I), *loc cit*, n 27.

[81] *Ibid.*

simply represented the individual subject's best bet for survival. Notwithstanding later glowing evocations of the status of the British subject as the 'best position in the world,'[82] subjecthood was thus in essence no more than a mere matter of personal survival. The British subject shared none of the positive ethical characteristics of the French Republican citizen. It was instead a mere reactive status; accepted only insofar as the sovereign might guard against the ever intrusive state of nature and guarantee moral order.

1.4. Natural Law and the Subject

Tempting as the simple equation of feudal allegiance with pragmatic Hobbesian principles of self-preservation through subjection may be, it is nevertheless here argued that to do so is fundamentally to misunderstand the historical nature of the common law and the origins and character of the British subject. The doctrine of allegiance dates from the 13th Century. Similarly, Calvin's case was heard 50 years before *Leviathan* was set to paper. Allegiance was thus evolved not in age of positive philosophy, but at a time when law and religious morality were in any case seen as being inextricably linked with one another. In short, or so it may be argued, allegiance and the British subject are products not of later man-made schemes systematically to ape—albeit imperfectly—God's order on earth, but of earlier human endeavours directly to translate Divine—yet material—values into law. Allegiance has its roots in natural law and not political philosophy. As a consequence, the characteristics of the British subject were to differ subtly but vitally from Hobbesian notions of subjection to the state. Most strikingly, there would appear to be an element in the doctrine of allegiance which indicates that it was a status positively embodying God-given values such as personal freedom, which might to a certain degree be defended against Hobbesian notions of unlimited sovereign power. It was the King's Judges and not the King who formulated the doctrine of allegiance and secured the status of the subject. Ensuring that God's prescriptions be reproduced on Earth was not to be merely a matter for a sovereign power's Christian conscience. Rather, the law was to play a role in normatively shaping and controlling the exercise of sovereign power. In other words, an early albeit very restricted form of constitutional government appeared to be in operation: or, in Bracton's phraseology the King had two things to fear—God and the law. Alternatively, the normative control and shaping of the sovereign power by

[82] The Governor of Mauritius, in, *British Citizenship*, *op cit*, n 23.

the common law thus entailed a notion of the *salus populi*, or the idea that a King ruled not merely by divine right but in accordance with the mores of an accepted legal system upon which his subjects might upon call to restrain and limit the extent of his rule.[83]

The claim that the common law doctrine of allegiance and subjecthood differ subtly but vitally from that of Hobbesian subjection, however, rests upon two premises: first, that uniquely amongst medieval legal systems, the common law had in some way insulated itself from the monarchical power from which it supposedly derived its authority; and secondly, that rather than take a negative approach to the maintenance of God's moral order on earth, merely regulating the state of nature within the physical borders of state, the law actively promulgated substantive natural legal values, and in so doing was prepared to attempt not only substantively to direct the exercise of sovereign power, but also and most remarkably even to question the validity of established notions of statehood.

Lord Coke was thus a representative of a legal system distinguished amongst its European counterparts since it had early established itself as a professional and distinct institution of government. Though founded by Henry II for the express purposes of effecting his political rule, a process of very rapid professionalisation was to determine that by 1300 the Judges constituted a distinct arm of government with their own dense web of rules and procedures no longer accessible to the layman.[84] Equally, in age which considered law and morality to be inextricably linked with one another, such professionalised Judges were developing their rules and procedures as a normatively coherent body of law. Translated into practice, the natural maxim that certain wrongs were *mala in se* rather than *mala quia in prohibita*, determined that the liberties and rights of the subject were ordained for men by the will of God, so that the work of the Judges

[83] J.W. Gough, *Fundamental Law in English Constitutional History*, (Clarendon: Oxford, 1955), at 53, a view confirmed by James I promise on his accession to the English throne to abide by the law. Kingship was a contract between Sovereign and people, a contract policed by the law. In James' own words 'the King bound himself by a double oath to the observation of the fundamental laws of his kingdom: Tacitly as by being a King, and so bound to protect as well the people as the laws of his kingdom; and expressly by his oath at his coronation; so as every just king in a settled kingdom is bound to observe that paction made to his people by his laws in framing his government agreeable thereunto according to that paction which God made with Noah after the deluge.'

[84] P. Brand, The Making of the Common Law, *op cit*, n 77.

consisted mainly in upholding them.[85] Accordingly, the administration of law was to become more than a mere matter of neutrally executing the will of the sovereign power. Instead, a highly distinct, professionalised and ethically driven body of King's Judges began normatively to shape and oversee the exercise of the King's power. Rights to property and personal freedom were God given. It was not the business of man or indeed of human government to interfere with them.

It was thus against this background of a professionalised and distinctly natural legal system that Calvin's case was decided. Accordingly, although Lord Coke's use of a feudal idiom to describe the structures of government appeared to mirror elements within *Leviathan*, the underlying premises of the Judgement were nevertheless drawn from natural rather than Hobbesian principles.

To recap briefly on the facts of the case: the accession of James VI of Scotland to the English throne had raised the thorny issue of whether Scots were subjects merely of Scotland or also of England. Politically speaking, this was a matter of vital importance since the admission that Scots be subjects of the English Crown would negate their alien status in England, thus giving them access to the full privileges of the English law. As noted, there was much parliamentary opposition to such a move. However, the simple fact that the law had evolved as a professional institution dedicated to the oversight of the executive power, determined that Calvin's suit was not to be decided purely on the grounds of political expediency, but rather in accordance with the substantive principles of natural law.

Reviewing *Calvin's Case* from this perspective, it becomes apparent that Lord Coke's decision was not merely concerned with the matter of establishing the nature of the relation of the individual Briton to his Sovereign, but was also dedicated to upholding man's God given and thus universal rights to property and individual freedom. Pleading for Calvin, Bacon was clearly to lay down the thinking of the common law:

> by the law of nature all men in the world are naturalised one toward the other; they are all made of one lump of earth, of one breath of God...It was civil and national laws that brought in these words of 'civic' and 'externus,' alien and native. And therefore, because they tend to abridge the law of nature, the law favoureth not them, but takes them strictly....[S]o...all national laws whatsoever are to be taken strictly and hardly in any point wherein they abridge and derogate from the law of nature..'[86]

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[85] J.W. Gough, *Fundamental Law in English Constitutional History*, *op cit*, n 83, 23.

[86] Quoted from Gough, *op cit*, n 83.

Liberty and property were the ordained right of man, merely secured by law. Man's actions in creating states and nations, and thus in denying the alien access to the law and his natural birthright had upset this Divine scheme: Hobbes turned on his head. The common law sought to remedy this folly. Though it could not of itself destroy states and re-establish 'the original law of nature and the universal law of nations,'[87] it could at the very least ensure the widest possible access to the protection of the common law. *Ius soli* was not a mere matter of land and feudal loyalty, it was thus also expressive of the common law's desire materially to promote Divine will, guaranteeing the inherent liberty and property of as many men as possible.[88]

Vitally for the course of British history, the common law was in *Calvin's Case* also to give material voice to its disapproval of the exclusionary effects of man made borders, itself stepping outside its own jurisdiction. In 1608 as today, English common law was just that, English. It did not have application in Scotland. In the one vital area of allegiance, however, the physical boundaries of such jurisdiction were broken. Those born within the King's dominions but outside the ambit of the common law were nevertheless given the same legal status as those born within it. Scots were to be given status under English law, Therefore, as the boundaries of the later Empire evolved, those who found themselves within them became British subjects not through political grant as was the case in ancient Rome,[89] but by natural right. As time progressed, and colonies became self-governing dominions, the extension of British subjecthood across the borders of many states and many nations was thus fully in accordance with the logic of the law.[90]

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[87] Lord Ellesmere, pleading for Calvin.

[88] As a vital aside, however, it should be noted that although 16th Century common law claimed to guide the exercise of executive power, it might not be regarded as an early form of fundamental law. As has been noted (J.W. Gough, *op cit* n 83), such ancient natural legal 'principles may be called fundamental, not so much because they could not be legally assailed as because it was assumed that no legal authority would wish to assail them.' In other words, the claim of the common law to uphold certain substantive normative values was always a fragile one. If Kings or a legislatively supreme Parliament should have determined 'evil desires upon them,' the common law could in fact do little to positively protect the liberty of the person or property rights.

[89] In contradiction of, D. Heater/D. Oliver, The Foundations of Citizenship, *op cit*, n 60.

[90] *Infra*, III.A.1, for the awkward post-war political consequences of the extra-territoriality of the doctrine of alliegance.

1.5. Conclusion

If anything might be said to explain the extraordinary historical resonance of the status of the British subject, it is quite possibly this commitment to a non-national and non-state based recognition of the natural rights of man. A substantive vision every bit as inspiring as the French declaration of the Rights of man and the Citizen, British subjecthood had but little to do with a Hobbesian notion of simple subjection to a single sovereign state. Rather, it was precisely the fact that it extended substantive rights beyond any narrow and 'unnatural' conception of the nation or the state which gave it such emotional force.

Such a conclusion, however, raises two vital points of interest. First, the characterisation of subjecthood as an inspiring product of natural law, necessarily requires a re-assessment of the somewhat negative appraisals of the 'organicism' of the concept of British subjecthood.[91] Thus, whilst Lord Coke's choice of a feudal construction to capture the essence of Calvin's relationship with his King, might on one purely factual level be claimed to have created a territorial rather than personal relationship between the Briton and the British state, this idiomatic earthiness may nonetheless be argued to have masked certain more inspirational considerations. Though British subjecthood was thus forever to lack the element of voluntarism which was to find its way into both French and American concepts of citizenship, and the British subject was consequently to continue to be 'born' rather than 'made,' his allegiance to the British state was predicated upon far more than the mere bartering of fidelity for protection. Rather, the status of British subjecthood was to bring with it this one vital guarantee: no person born within the Realm would ever be excluded from the protection of the law, or from the enjoyment of natural rights. Accordingly, whilst no formal ties were to be created between individual Britons, they were nonetheless to share in the 'common' protection of a law which fully recognised their quality as 'natural' individuals.

Equally, however, the specifically natural law roots of the British subject, raise the interesting question of why, given subsequent developments in political philosophy, subjecthood was to remain a relatively static concept and was not to evolve in much the same manner as was the revolutionary notion of French citizenship? In explanation: English common lawyers were far from being the sole purveyors of

[91] See in particular, J.W. Salmond, 'Citizenship and Allegiance' (Part I), *loc cit*, n 27, 'Citizenship and Allegiance' (Part II), *loc cit*, n 31.

'rational natural law.'[92] Rather, this natural view of man was clearly derived from a common European tradition.[93] Thus, in a later French setting, the rational natural notion that all individuals be born equal in right, was inexorably to be wedded with notions of territorially delimited sovereign power, was likewise to be translated into positive constitutional values, and was so to give birth to the concept of the *Citoyen*. This particular marriage of natural law with political philosophy may thus be argued to have had two vital consequences: on the one hand, determining that the territorial state (or nation), no longer be viewed as being disruptive of the natural rights of man, and instead be seen as their natural guardian; and on the other, leading to the positive constitutional expression of individual rights, so marking a fundamental break with classical citizenship and the favouring of the 'second' citizen above the *polis*.[94]

Despite a strong 'national' tradition of political philosophy, lawyers in the United Kingdom were not, however, to adapt their perception of the individual Briton to suit the strictures of a modern age: British subjecthood continued to apply across the borders of many nations and many states; equally, natural rights, ever fragile, were never to be given positive and unassailable legal expression as constitutional individual rights. The reasons for this failure (and others), however, are to be found in the further examination of the particular manner of the reception of political philosophy—and philosophical views on the individual Briton—within English constitutionalism.

2. *Blackstone's Commentaries*

Moving on through history, a second determining moment in the evolution of the constitutional position of the individual Briton, was to come with the publication of Blackstone's *Commentaries* in the years 1765-9. Over four volumes of densely written prose, Blackstone was to attempt systematically to order the vast jurisprudence of the common law so as to provide a coherent and comprehensive description of the English Constitution and legal system. Consciously designed to promote university involvement in legal education and to educate the landed classes in the workings of British government, the *Commentaries* were an endeavour to draw up 'a general map of the law, marking out the shape of the country,

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[92] Or in modern German terms, *Vernunftsrecht*.

[93] J.W. Gough, *Fundamental Law in English Constitutional History*, (Clarendon: Oxford, 1955), 23.

[94] P. Riesenberg, *Citizenship in the Western Tradition*, *op cit*, n 3.

it's connections and boundaries, it's greater divisions and principal cities.'[95] A creature of their time, the four volumes made little or no distinction between constitutional law, or the frame of government, and the more general system of private law; the 18th Century usage of the term 'constitutional' having but little in common with more modern notions of a higher law secure from the predatory attentions of the legislature. Rather, Blackstone sought to give an overview of the 'constituted,' or 'existing arrangement of governmental institutions, laws and customs, together with the principles and goals which animated them.'[96] Such an overview, however, was to prove of vital significance to the status of the individual Briton.

Whereas *Calvin's case* had been concerned solely with the establishment of the individual Briton's 'civic' status under a law and within a system of government which as yet had very little conception of the notion of political community; Blackstone's commentaries followed upon the evolution of a nascent 'democratic' system and so began to address the question of where the individual stood in relation to—not a simple hereditary sovereign—but an increasingly 'inclusive' body politic or state. In this regard, however, Blackstone's analysis of then current philosophical thinking becomes noteworthy for two reasons: first, explicating and justifying the law's refusal to admit of voluntarism and/or the incorporation of the individual Briton within the British state; and secondly, emphasising the Briton's continuing and 'pre-statal' natural status with personal liberty being expressed not through positive 'higher' law, but within an extensive private sphere not only existing prior to the state, but also delimited and governed not by political edict, but by the common (and customary) notion of the rule of law.

2.1. Privilege Preserved: Locke Rejected?

On one reading, Blackstone's powerful exposition of law and government is all about defence: the preservation of an antiquated and illogical law, and a privileged-based system of government, against more modern philosophical and revolutionary forces[97] . First, the common law

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[95] *Commentaries on the Laws of England*, (Chicago University Press: Chigaco 1979), I:35.

[96] Bernard Bailyn, quoted by Stanley N. Katz, in introduction to, *Commentaries on the Laws of England*, *op cit*, n 95.

[97] Cf, Duncan Kennedy, 'Blackstone's Commentaries,' (1979) Vol 28 *Buffalo Law Review*, 209-382.

itself was being called increasingly into question: the manifold inequities of a complex, contradictory and creaking Judge-made law casting positive and codified schemes of civilian law in an increasingly attractive light. Accordingly, certain of the volumes' most pungent criticisms were reserved for the purveyors of a civil law system which was deeply tainted by the 'despotic monarchy of Rome and Byzantium.'[98] Secondly, and more importantly, however, evolutions in positive philosophy were similarly threatening the entire and ancient scheme of British government, and a large part of the work was therefore seemingly dedicated to justifying and preserving existing governmental institutions.

The primary plank in this mission to defend the existing constituted institutions of British government against possibly revolutionary philosophical advance was the denial that sovereignty reside in the British people and the re-affirmation of the executive sovereignty of the 'supreme magistrate' the King, and of the legislative sovereignty of a Parliament comprising the three estates of the King, Lords and Commons. Though clearly impressed by Locke's treatise that:

> there remains still inherent in the people a supreme power to remove or alter the legislature, when they find the legislative act contrary to the trust reposed in them: for when such trust is abused, it is thereby forfeited, and devolves to those who gave it,[99]

he could agree with it only 'in theory.'[100] Clearly belonging to that section of the section of the British establishment which remained traumatised by regicide, civil war and the general perceived lawlessness of proto-socialist groups such as the levellers, Blackstone rejected Locke's contractarian notion of popular sovereignty with a wholly positivistic argument which nonetheless readily betrayed his underlying fears that such a notion might lead the UK back to a nasty and brutish state of nature. Locke's conclusion was 'just' but might not be accepted:

> under any dispensation of government at present actually existing. For this devolution of power, to the people at large, includes in it a dissolution of the whole form of government established by that people, reduces all the members to

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[98] I.5. Similarly, In a move of some cunning, Blackstone was likewise to attribute the failings in the common law to the subversive influences of the 'foreign clergy,' who had entered Britain 'in shoals' with the Normans, and whose promulgation of the canon law version of civil law had upset the perfect scheme of common law evolved under Saxon government. If there were failing in English law, this was clearly the fault of the 'popish clergy,' I. 16, I. 17.

[99] Locke (Treatise on Governments), cited in the commentaries, I. 157.

[100] I.57.

their original state of equality, and by annihilating the sovereign power repeals all positive laws whatsoever before enacted. No human laws will therefore suppose a case, which must at once destroy all law, and compel men to build afresh upon a new foundation; nor will they make provision for so desperate event, as must render all legal provisions ineffective. So long therefore as the English constitution lasts, we may venture to affirm, that the power of parliament is absolute and without control.[101]

That Blackstone, a Whig, sympathised with Locke was readily demonstrated by his confirmation that government be established by the people. In his view, however, establishment was a one way process. Post James II, Blackstone was confident in stating that English King's possessed executive sovereignty not by *jure divino*, but 'by the general consent of the people,' the evidence of which was 'long and immemorial usage.'[102] The rub in this construction, however, was that consent, once given, might not be withdrawn. The supreme power (legislative and executive) lay not in the people but in Parliament. Thus, whilst in Locke's analysis the people formed the body politic; in Blackstone's, it was 'the King and these three estates—lords temporal, spiritual and commons who together form the great corporation or body politic of the Kingdom'[103]

Blackstone's notion that the existing scheme of government in Britain be based on the irreversible consent of the people was itself founded upon a fairytale: the notion that a wise and just Saxon polity had irrevocably transferred its sovereign power to a single a person, so transforming a state of nature into a civil society and laying the basis for all future constitutional evolution. Quite simply fabulous and with little or no basis in fact, the fiction of abiding Saxon 'consent' was nevertheless to prove surprisingly influential in legal circles,[104] and was thus to join with other factors in contributing to an abiding respect for the notion of parliamentary rather than popular sovereignty. Far more significant in this respect, however, was Blackstone' s apparent underlying motivation for rejecting a contractarian approach to government and choosing to support existing

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[101] I.157.

[102] I.183-184.

[103] I.149.

[104] Remarkably, this notion was to deeply influence legal thinking right up until the time of Dicey. Dicey himself sought to dispel the myth dismissing as ridiculous the notion 'that every step towards civilisation has been a step backwards towards the simple wisdom of our uncultured ancestors,' Dicey, *Law of the Constitution*, (Eighth Edition), (MacMillan: London, 1926).

structures of government: the conservatism which derived from a fear of a return to the lawlessness of a state of nature.

Barely a Century after the disturbing events of the civil war, the spectre and consequences of civil disorder still loomed large in the imagination.[105] Though Locke's liberal theories were particularly appealing to a common law mind, to no small extent reproducing the ancient legal notion of the *salus populi*, their inclusion within the constitution would necessarily involve great institutional upheaval. To admit of Locke' primary thesis of the inherent political and not just civil equality of man, would as a matter of logic require the levelling of the three political estates. Not only the Monarch, but also the Church and Aristocracy need so be reduced to the Common's level. That such a step might be taken without a degree of social upheaval, however, seemed beyond the bounds of possibility. It was thus surely to be rejected for fear that it rekindle the fires of civil and social disorder so recently dampened. In short: peace was to be prized above constitutional perfectionism. The perfect constitutional translation of the positive mores of moral philosophy had advantages 'in theory.' Such normative gains, however, were always to be measured against the more immediate threat of civil strife. Though the confirmation of parliamentary sovereignty ran counter to contemporary developments in liberal theory, preserving privileged government, denying the political equality and sovereignty of the individual Briton, and in theory even posing a threat to the preservation of common law civic rights, it was nevertheless to be preferred above the horrors of social upheaval.

a) Privilege Justified

Importantly, Blackstone was not content with merely preserving privileged and explicitly hierarchical government. Instead, in a intellectual move which was to have profound and lasting effects upon the position of the individual Briton, he sought to justify the preservation of the three estates within the sovereign parliament with the argument that such distinctions, or in technical parlance the mixed constitution, contribute to the evolution of an optimal polity, displaying all the characteristics of 'supremacy, wisdom, goodness and power.'[106]

A variation upon the theme of the balance of powers, the notion of the mixed constitution nevertheless varied vitally from it, ascribing to each

[105] Christopher Hill, *The Century of Revolution*, (Sphere Books: London, 1974).
[106] I.49.

estate distinct functional characteristics of wisdom, goodness and power, which when brought together would not only act as a check upon each other, but would coalesce to give good government. The ancients had admitted of only three regular forms of government:

> the first, when the sovereign power is lodged in an aggregate assembly consisting of all the members of a community, which is called a democracy; the second when it is lodged in a Council, composed of select members, and then it is styled an aristocracy; the last, when it is entrusted in the hands of a single person, and then it takes the name of a monarchy.[107]

Each such form of government had its distinct advantages and disadvantages. A democracy supplied 'public virtue,' 'goodness of intention,' and 'a degree of patriotism.' Popular assemblies, however, were also 'frequently foolish.' Aristocracies on the contrary, supplied a greater degree of 'wisdom; being composed, or intended to be composed, of the most experienced citizens.' Such virtues were nevertheless always to be balanced against aristocratic dishonesty and weakness. Finally, the monarchy was the most powerful form of government, 'all the sinews of government being knit together, and united in the hands of the prince.' But then again, the monarchy brought with it the imminent danger that strength be deployed to improvident or oppressive purposes.'[108]

A fourth form of government, composed of all such qualities, had appeared to the ancients to be no more than a visionary whim: a form of government which might never be lasting or secure.[109] In Blackstone's analysis, however, the British Constitution was 'a standing exception to the truth of this observation.'[110] Instead, the British people had perfected such mixed government, mixing and matching the functional qualities of the three estates so that they complement and check one another:

> For, as with us the executive power of the land is lodged in a single person, they have all the advantages of strength and dispatch, that are to be found in the most absolute monarchy; and, as the legislature of the Kingdom is entrusted to three distinct powers, entirely independent of each other; first, the King; secondly, the lords spiritual and temporal, which is an aristocratic assembly of persons selected for their piety, their birth, their valour, or their property; and thirdly, the house of commons, freely chosen by the people from among themselves, which makes it a kind of democracy; as this aggregate body, actuated by different springs, and attentive to different interests, composes the British Parliament, and has the

[107] I.49.

[108] I.49-50.

[109] Blackstone citing Tacitus, I.50.g.

[110] I.50.

supreme disposal of everything: there can be no inconvenience attempted by either of the three branches, but will be withstood by one of the other two; each branch being armed with a negative power, sufficient to repel any innovation which it shall think inexpedient or dangerous.[111]

The inherent civic virtue of the third estate would lead it to check the dishonesty of aristocracy; the wisdom which attached to noble birth would override the folly of the general populace; and the two estates acting together would act as an effective check of the despotic tendencies of a sovereign monarchical power which was nonetheless a vital pre-condition for effective government.[112]

b) Civic Virtue and the Common Good

Beyond providing the UK with an optimal form of government, however, the formalisation of the three estates and thus of social inequality within the sovereign parliament, were argued also have to a beneficial effect upon the social and civic attitudes of the populace as a whole: the system of rank and privilege serving the ancient aims of civic republicanism, and exhorting the Briton to greater individual effort in the service of the community. The 'distinction of rank and honours' were necessary 'in order to reward such as are eminent in their services to the public, in a manner the most desirable to individuals, and yet without burthen to the community; exciting therefore an ambitious yet laudable ardour and generous emulation in others.'[113] The gift of nobility remained within the hands of the King, and he in the old feudal manner would dispense of such honour only to those who adequately demonstrated that their personal ambition be compatible with and thus 'subservient to the public good.' The pursuit of personal honour 'so dangerous and invidious in a mere republic,' might under a free monarchy be controlled and directed to the purposes of the public good: the formalised scheme of rank being one and at the same time a incentive to personal ambition yet a check on destructive egotism.

Cohesive community, or the public good, however, was also seemingly served by restrictions placed on the franchise to the Commons. Notion's

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[111] I.50-51.

[112] As an important aside, the notion of 'balance' seemed equally to pervade the make-up of the Commons: two distinct groups being represented; the Knights of the shire representing minor land owning interest, the citizens 'the mercantile or trading interests of the Kingdom,' I. 168.

[113] I.153.

comparable with the Rousseauean ideal of radical democracy had yet to fully permeate the 18th Century mind. Blackstone's was no exception. Whilst he conceded that 'upon the true theory and genuine principles of liberty, every member of the community, however poor, should have a vote in electing those delegates, to whose charge is committed the disposal of his property, his liberty and his life;' such a view was nevertheless to be tempered by the requirement that the democratic polity be made up of 'free agents.' In other words, the democratic polity need be made up of equals to ensure a measured weighing up of issues. Only free agents might interact 'upon a level with each other,' and accordingly persons of 'indigent fortune' or such as were 'under the immediate dominion of others' were to be denied the franchise since they were 'esteemed to have no will of their own.'[114]

Such views were common throughout contemporary Europe, and in Britain as on the continent, were to loose their persuasive power as the forces of radical democracy grew stronger.[115] Another of Blackstone's prescriptions, designed to harness the democratic polity to the higher needs of the common good, however, was to leave a lasting impression upon the British Constitution. District based representative government was thus to be preferred above all others forms for two reasons. First, the use of constituencies or 'minute and separate districts' which chose representatives was no more than an attempt to retain some of the intimacy of classical city-based government in a modern Nation-State setting. In such small areas 'voters might easily be identified.'[116] The polity was local and immediate and thus encouraging of active participation and mutual control. Secondly, however, representatives once chosen by a local district became servants of the nation, and not of the constituency from which they originated. Representation was distinct from mandation. Representatives were not the handmaidens of their constituencies. Instead, the aim of their presence within parliament was 'not particular but general; not barely to advantage constituents, but the *common* wealth.'[117] The benefits of such a form of democratic polity government were thus twofold being encouraging both of active citizenship participation and of the national common good.

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[114] I.165.

[115] The Reform Acts of 1832 and 1867 gradually lessening property requirements.

[116] I.154.

[117] I.154.

2.2. *The Birth of the Liberal Constitution?*

In one analysis, Blackstone was quite simply a 'toady.'[118] His excessive concern not only to preserve but also to justify the preservation of privilege within the scheme of British government was deeply reactionary; contributing to the perpetuation of a British civil society based on rank and privilege, or the notion that each individual Briton be irrevocably tied to a distinct rung in a hierarchical social ladder. Status was thus to be the defining characteristic of British society and of the British polity. Where one stood in the social and political hierarchy dictated one's position in the polity. Personal characteristics were imputed to social standing. The indigent were without a free will. The citizen or burgess was virtuous and patriotic but frequently foolish. The aristocratic 'displayed that delicacy of sentiment so peculiar to noble birth' and were thus wise but also inherently dishonest. The monarch a true Leviathan, but with disturbing despotic tendencies. Each according to his positive characteristics would be allotted a distinct place in the polity: a position likewise designed to restrain and curb his worst failings.

That such a status-based polity be attributed to the 'consent' of the populace, the 'evidence of which was long and immemorial usage,' has been described as an unashamed perversion of Locke's political philosophy.[119] The underlying theme of contractarian government, popular consent to government, being taken out of its egalitarian setting and transposed to a governmental system where men appeared not to be rights-bearing political equals, but status-bound members of distinct social and thus political and non-political classes: a deeply illiberal view of the Briton, predicated upon inherited difference and imputed personal characteristics rather than on inherent and natural equality.

Such a stark statement notwithstanding, there are nevertheless many indications that Blackstone's was a far more liberal view of the position of the individual Briton than yet presented. His disagreement with Locke was a practical and not a theoretical one. He had integrated modern political philosophy within his thinking so far as to concede that under the 'true and genuine' principles of liberty, all men, no matter how poor, should have say in the disposal of their life and property. Similarly, if changes were to be made in the system of British government 'it should be in favour of a

[118] Stanley N. Katz, in introduction to, *Commentaries on the Laws of England*, *op cit*, n 95.

[119] Duncan Kennedy, 'Blackstone's Commentaries,' *loc cit*, n 97.

more complete representation of the people.'[120] Indeed, though couched in the natural law terms of the times, Blackstone's introduction to the *Commentaries* made immediately plain his comprehensive commitment to the primary tenet of liberal philosophy, the inherent equality of man:

> The absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated the natural liberty of mankind. This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature: being a right inherent in us by birth, and one of the gifts of God to man at his creation, when he endued him with the faculty of free will.[121]

Anticipating the imminent North American constitutional settlement, however, Blackstone did not merely see all 'men as created equal.' Instead, he re-iterated the important role that law played in securing the inherent equality of man through its view of all men as bearers of certain absolute or natural 'rights': rights which were legally secured and which firmly anchored the notion of liberty within the United Kingdom:

> And this spirit of liberty is so deeply implanted in our constitution, and rooted even in our very soil, that a slave or a negro, the moment he lands in England, falls under the protection of the laws, and with regard to all natural rights becomes *co instanti* a freeman.[122]

Alternatively, a restatement of the classical liberal construction whereby individual rights be recognised by law so securing both the natural equality of the individual and freedom throughout a society.

Blackstone's *Commentaries* are thus open to a second interpretation. He was not merely engaged in justifying an existing social order based on rank, privilege and imputed characteristics. Rather, his mission was of a far more ambitious nature. In cataloguing and arranging a diffuse body of judge-made law, politically expedient institutions and historical compromises on the distribution of power, all the while claiming that such apparently random legislative acts and judicial pronouncements conform to a higher and coherent logic, he was reinventing the common law and political system of the United Kingdom, so giving birth to the protean liberal constitution.[123] As a piece of logical philosophy, such an endeavour

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[120] I.166.

[121] I.121.

[122] I.123, Emancipation effected by common law jurisprudence prior to statutory confirmation.

[123] Duncan Kennedy, 'Blackstone's Commentaries,' *loc cit*, n 97, at 380.

has been termed 'supremely unconvincing,'[124] and indeed Blackstone's residual reliance on historical myths such as the enlightened Saxon polity was to be treated with contempt by subsequent constitutional thinkers.[125] Nevertheless, the *Commentaries* were to prove extraordinarily influential in framing the terms of the liberal constitutional debate; terms which were followed by political writers from Bentham to Austin to Mill. Far more importantly, however, Blackstone's description and justification of the constitutional and legal system proved convincing enough in legal circles to preserve the scheme of law and government substantially as it was, so having profound effects both on the further evolution of the UK constitution and on the position of the individual Briton. Whilst American and French Revolutionaries sought to iron out the lacunae and inconsistency in what was perceived to be an incomplete and illogical constitution,[126] so giving rise to coherent and distinct notions of citizenship, the UK was to continue to adhere to its ad hoc constitution and (in rigid citizenship terms) curiously incomplete view of the position of the individual Briton.

a) The Rule of Law: Right vs Right and Power vs Right

At the core of Blackstone's attempt to re-invent the English common law and the British scheme of government as a coherent and logical system, lay the classical liberal dilemma of how to balance individual right against individual right and individual right against common power.[127] In being the first English constitutionalist to tackle this conundrum, however, Blackstone was undertaking at least two tasks: the first, the modernisation of the common law, so taking it away from indistinct natural law notions of the *salus populi*, and incorporating within it more precise and positivistic notions of Hobbesian sovereignty. The second, the formalisation and

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[124] *Ibid*, 263.

[125] Dicey, *Law of the Constitution*, Eighth Edition, (MacMillan: London: 1926).

[126] Revolutionary dissatisfaction with the complex and incoherent nature of the UK constitution perhaps best expressed by Thomas Paine, 'Absolute governments (tho' the disgrace of human nature) have this advantage with them, that they are simple; if the people suffer they know the head from which their suffering springs, know likewise the remedy, and are not bewildered by a variety of causes and cures. But the constitution of England is so exceedingly complex that the nation may suffer for years together without being able to discover in which part the fault lie, some will say in one and some in another, and every political physician will advise a different remedy' (Common sense).

[127] Duncan Kennedy, 'Blackstone's Commentaries,' *loc cit*, n 97.

categorisation of existing but not yet rationalised notions of the rule of law, so creating a mediating barrier between private rights and between rights and power.[128]

The attempt to portray the evolving scheme of British government and law as a mechanism whereby individual rights and public power might be balanced against one another revolved around three themes. First, the division of rights into natural and relative rights, and the portrayal of government as a purely functional instrument whose primary aim was to maintain natural rights or 'residual liberty.' Second, a statement that judges and the common law derive their authority directly from the sovereign Crown, but nevertheless be independent from it, enforcing a higher 'natural' law and the customary law of the people. And thirdly, the formalisation of the rule of law as a mediating boundary between sovereign power and the rights of the people and between the rights of individual Britons.

b) Natural, Absolute and Relative Rights

To begin, however, with the distinction between natural or absolute rights and relative rights. Absolute rights were rights vested in man in a state of nature. Relative, those 'which are incident (to man) as members of society, and standing in various relations to each other.'[129] Further, absolute rights were those of property, liberty, personal security and personal honour.[130] Vitally for the course of British constitutional history, however, such rights were not to be given legal expression as positive rights attaching to individuals. Rather, they were best to be conceived of a liberties protected not by positive normative expression, but by the scheme of relative rights which created a civil society, conducive of the good order and social success which allowed for the preservation of as much natural liberty as was possible in a social setting. The preservation of natural liberty was the sole aim of civil society, and should law or government indulge in any other activity it be considered distinctly uncivil:

> Political therefore, or civil liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no further) as is necessary and expedient for the general advantage of the publick. Hence we may collect that the law, which restrains a man from doing mischief to his fellow citizens, though it diminishes the natural, increases the civil liberty of mankind:

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[128] *Ibid.*

[129] I.119.

[130] I.123-130.

but every wanton and causeless restraint of the will of the subject, whether practised by a monarch, a nobility or a popular assembly, is a degree of tyranny.[131]

Blackstone admitted of Locke's reasoning that law and law alone created liberty.[132] This it did, however, not by any foolish attempt to positivise man's God-given, and thus logically boundless liberty, but by the construction of a social order which restricted natural liberty only insofar as was necessary for the maintenance of order. Anticipating Mill, Blackstone deemed good and successful law and government to be that which restricted itself to the maintenance of good order, leaving the individual subject as great a degree of natural liberty as be possible. Law was necessary:

but then on the other hand, that constitution or frame of government, that system of laws, is alone calculated to maintain civil liberty which leaves the subject entire master of his own conduct, except in those points wherein the public good requires some direction or restraint.[133]

Government should have one purpose, the preservation of natural liberty. A Government that achieved such a goal was doing no more than preserve the natural rights of man. Accordingly, Blackstone might state with confidence that:

[T]he absolute rights of every Englishman (which taken in a political and extensive sense, are usually called their liberties) as they are founded on nature and reason, so they are coeval with our form of government.[134]

Unlike post-revolutionary Americans or Frenchmen, the Briton was not to be constituted by positive rights. Instead, the Briton was what he had ever been, a inherently autonomous being, whose natural liberty it was the sole purpose of civil government to preserve. The individual was not an adjunct to but existed independently from and prior to society. In a social setting, government and law were a necessary evil, but were legitimate only to the extent that they served the individual, not creating his liberty, but preserving it. This, a classic statement of the abiding 'negative liberalism' of the British Constitution thus furnished Blackstone with a simple yet far-reaching justification for the existence of sovereign power : it was there not to give positive expression to society's demands, but rather to preserve the individual's God-given identity.

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[131] I.122.

[132] 'Where there is no law there is no liberty,' I.122.

[133] I.122.

[134] I.123.

c) *Judicial Independence*

A vital component within Blackstone' s constitutional attempt to preserve the natural liberty of the Briton, however, was the social legitimacy and independence of the common law or the Judges. With an eye to the Hobbesian demand that there be but one sovereign power within the state, Blackstone conceded that the law derived its authority from the Sovereign. Judicial power was a part of the Royal prerogative. The King was thus 'the fountain of justice.' With an equal regard to Locke, however, the King was not 'the author or original' of justice 'but only the distributor' of an 'original power of judicature, [which] by the fundamental principles of society, is lodged in the society at large.' A source of justice which had for reasons of convenience been transferred to the King and his substitutes to act as a 'steward of the public.'[135] The judiciary were the King's substitutes and in turn:

> by the long and uniform usage of many ages, our Kings have delegated their whole judicial power to the judges of their several courts; which are the grand repository of the fundamental laws of the kingdom, and have gained a known and stated jurisdiction, regulated by certain and established rules, which the Crown itself cannot now alter but by act of parliament.[136]

In other words, the Judges were legitimated both as guardians of society's justice and as delegates of the sovereign power. They were, however, similarly fully independent from the crown and detached from society or the public to the extent that their status might only be altered through act of parliament.

d) *The Rule of Law*

The independence of the judiciary was in turn vital since they, through the notion of 'the rule of law' were to mediate both between the sovereign power and the liberties of individuals, and between the rights of individuals themselves. In a dual construction, the rule of law demarcated the barrier between government and society so attempting to ensure that government serve the preservation of natural liberty, and drew the lines between individual Britons, so equally safeguarding the maintenance of civility within the private sphere of British society.

In explanation: though the absolute legislative sovereignty of parliament and unlimited executive sovereignty of the Crown precluded any modern

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[135] I.257.

[136] I.258.

form of judicial review, the ancient common law doctrine that 'the King can do no wrong,' at once confirmed such sovereignty and opened up the way for the Judges to police the exercise of sovereign power, ensuring that no person might falsely cloak themselves with such authority to do violence to the liberties which lay at the heart of the British constitution. Rights were natural and unlimited, but might not be enjoyed in a social setting without a sovereign power to limit and enforce them. Such sovereign power, however, was legitimate only to the extent that it served the preservation of natural liberty. To that end, the sovereign power was 'hedged,' or controlled, both by procedural rules and institutional arrangements, including the limitation of the crown prerogative, the distinction between executive and legislative sovereignty and the division of powers between the three estates. Any act which did not conform to such procedural rules or institutional, arrangements was thus no longer part of a scheme of government 'coeval with....the absolute rights of every Englishman' and might so be judicially restrained.

In other words, the exercise of any authority outside the ambit of the sovereign power was a private act and thus subject to the control of the common law or the customary law of the land.[137] According to Blackstone, customary law was just that: law based on the custom of the people which was deciphered by judges on the basis of learning, reason and judicial precedent. The judiciary were:

> the depository of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land. Their knowledge of that law is derived from experience and study.....and from being long personally accustomed to the judicial decisions of their predecessors.[138]

Alternatively, customary or common law had a double legitimacy. First, as the law of the people 'which carries this internal evidence of freedom along with it, that it was probably introduced by the voluntary consent of the people.[139] And secondly, as a judicially collated body of law, founded upon reason and judicial precedent.

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[137] This is a vital point, explaining the failure of the British Constitution to develop any form of distinct administrative or public law. Alternatively, as the legislature and executive are sovereign, they might do no wrong and might not be subject to judicial review. Any act falling outside such power, however, be a private act, and thus subject to review by the normal law of the land. In other words, failure to observe government procedures is not a matter for public law but for private law.

[138] I.69.

[139] I.74.

Outside the distinct sphere of civil government (or statute law), the common or customary law of the land thus sought to regulate relations between private individuals, balancing right against right according to the established custom of the land, and the higher logic of the natural law of the Kingdom. The rule of law therefore had a dual function: firstly, demarcating the sovereign power from the private sphere; and secondly, maintaining social order amongst individual Britons, so attempting to preserving their individual liberty.

2.3. Conclusion

If it be accepted that Blackstone was not merely a reactionary, concerned exclusively with the preservation of privilege and outmoded government, his primary achievement must be recognised to be his reformulation of the entire existing body of common law, political practice and governmental structures to include within it modern philosophical considerations: most vitally, combining Hobbesian principles of sovereign power with a Lockean view of the equal rights of man to establish the pivotal and mediating notion of the rule of law, and so give birth to the protean liberal constitution.[140]

However, as already noted, Blackstone's efforts were likewise tainted by his deep conservatism and his fear of a return to the lawlessness of civil war, and so carefully crafted to ensure the preservation of existing structures of government and to avert any radical (and in his view dangerous) measures of reform. Accordingly, whilst new philosophical thoughts were to be incorporated within the constitution, such thoughts were nonetheless to be tailored and re-arranged to secure institutional continuity. In the opinion of one commentator, such an exercise ultimately entailed an ashamed perversion of the political philosophy of commentators such as Locke.[141] Whilst this may be argued to be an overstatement, to the extent that Blackstone's mission was indeed a success and his defence of the existing British institutions was to set the terms of constitutional debate for the next two centuries, the curious nature of his philosophical tinkering may nonetheless in large part explain the evolution of a rather incomplete and contradictory constitutional view of the British state, the Briton and the relationship between the two.

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[140] Duncan Kennedy, *loc cit*, n 97.

[141] *Ibid.*

Most strikingly, his curious view of contractarian government, which revolved around the somewhat mythological notion that a wise and just Saxon polity had irrevocably transferred its sovereign powers to a 'supreme magistrate,' or monarch, who in turn had chosen to exercise his sovereign power together with an aristocratic and spiritual estate and the representatives of the third estate, determined that the British body politic be made up not of the people, as Locke foolishly would have it, but of the Sovereign in Parliament. Justifying privilege and hierarchy and preserving it within the political community, such a view was not only to ensure that the British political citizen be forever forced to coexist and co-operate with his natural aristocratic enemy, but was also to act as a solid bulwark against the incorporation of the British people within the British state. Whilst a revolutionary France was thus to begin the long process of a return to the classical conception of the state as a set of fellow-members, or citizens, incorporated within one body, the United Kingdom would continue to adhere to its curiously detached view of a British people which was represented within, but did not itself make up the body politic or state.

Given the detached nature of the British people, the continued determination of who might be British through an organic and non voluntaristic, allegiance-based, concept of subjecthood remained tenable: membership of the British people, even if such membership entailed the franchise, was not inevitably to entail membership of the British state or body politic, and in stark contrast to Rousseau's scheme of citizenship, need thus not be based upon philosophical/emotional concordance with the British state (or nation). Alternatively, with regard to the vast mass of British subject-citizens,[142] inclusion within the British state was to be a matter of representation, rather than incorporation.

As an interesting aside, the dual-notion that Britons had irrevocably transferred their sovereign power to a supreme magistrate, and so were represented rather than incorporated within the British state, was to lead Maitland to describe the scheme of government within the United Kingdom with analogy to the common law instrument of the 'trust.'[143] Whereas, in France the classical civil law notion of the corporation—or the joint holding of property—was to become the guiding principle of the modern state or republic, the British state seemed more closely to reflect

[142] Excepting of course, the Lords Temporal and Spiritual (aristocracy and church), directly incorporated within the body politic.

[143] E.W. Maitland, translation of, Otto Gierke, *Political Theories of the Middle Age*, (Cambridge Paperback Library: Cambridge, 1967), (original edition 1900).

the ancient common law trust, whereby the British people (beneficiaries) transferred formal possession of their power (property) to a supreme magistrate, who together with the Parliament (trustees), was to rule in the interests of the people (beneficiaries). Such an analogy again proves useful to this study, underlining the point that whilst the British had surrendered sovereign power to their rulers, such rulers were in a somewhat paternalistic construction, nonetheless required to exercise power with reference to the interests of the people: their greatest interest being identified as a natural or 'residual' liberty, which was to be best protected not through the positivisation of rights, but through the creation of 'good' forms of government (mixed government) and judicial oversight (rule of law), which would 'naturally' respect, and seek to preserve such liberty.

The notion of residual liberty, or the negative liberalism of the British constitution,[144] however, raises further points of interest. Most clearly, since the rights of Britons were not to be positivised, the problem of the self-interested and individualistic citizen did not arise.[145] Equally, however, the area of residual liberty was to be a large one. In Blackstone's analysis the curious detachment of the Briton from the state was also to have its flip side: though the Briton was not to be an integral part of the state, by the same token, he enjoyed an autonomous sphere 'outside' the state. In neither linking the Briton's natural rights to a their positive legal expression, nor incorporating the Briton within the state, the individual Briton was to be given a status quite independent from the state—unlike the Frenchman, the Briton was not to be constituted by the state, and thus enjoyed an existence all of his own.[146] To a certain degree reproducing Bacon's reasoning in *Calvin's* case, Blackstone demoted both the state and its law: it's sole purpose was to create through relative rights the conditions in which the Briton might enjoy the natural rights given unto him by God—rights which no human authority might secure. In other words, the individual was free to do as he would, so long as he not infringe upon the relative rights which secured the absolute freedom of other Britons. Interestingly, the common law was likewise to be given a

[144] A construction again expressive of the negative liberalism of the British constitution. For the stark difference between 'negative' British liberalism and more positive and individualistic notions of American liberalism, cf, J. Gray, *Liberalisms: Essays in Political Philosophy*, (Routledge: London 1989).

[145] Paternalistic and representative government also furnishing a useful foil to self-interest.

[146] Alternatively, if Frenchmen were constituted by positive rights secured by the French state, they would seem to be little more than an adjunct to that state.

particular status within this autonomous sphere. Not only was it legitimated since it was derived from the sovereign power of the supreme magistrate, but also since the Judges claimed a direct link with original authority of the people and natural justice. Accordingly, where the political community had yet to play its part in securing the relative rights and thus natural liberty of the Briton, the common law—with its dual legitimation—might mediate between Britons, enforcing their view of social justice, and establishing on a day to day basis, the relative rights necessary for the functioning of a civil society.

As a final aside, in refusing to elevate to rights of the individual Briton to the status of positive law which might be protected against the state, Blackstone explicitly relinquished certain earlier claims of the common law to be able to protect the rights of the individual against Parliament or the Sovereign.[147] Probably a mere matter of political expediency in an age when Judges were hesitant to challenge the powers of a resurgent House of Commons, such a retreat was nonetheless to be compensated for by the establishment of a nascent liberal constitution through judicial independence and the primary role of the common law in policing the notion of the rule of law. This fact, however, necessarily begs a further question of why such a protean liberal constitution was never fully to mature and to bring with it a positive liberal view of the Briton. An answer, however, is to be found in an examination of a third moment in the evolution of the British Constitution which was to bring with it the sting in the tail of British constitutional history: the development of a specifically English and somewhat conservative form of legal positivism.

3. Dicey's Law of the Constitution

Written over a series of eight editions published between 1885 and 1926,[148] Dicey's *Law of the Constitution* was to have a profound effect both upon constitutional thinking and the scheme of government in the United Kingdom: being on the one hand, the first legal text to establish constitutional law as a distinct body of jurisprudence; and on the other, proving to be a statement of law so authoritative as to render its author the father of the modern British constitution. The *Law of the Constitution* thus remaining the main inspiration for British constitutional law to this day.

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[147] Most notably, Lord Cooke's attempts to overturn an Act of Parliament in *Bonham's Case*.

[148] All references here taken from the Eighth edition, *op cit*, n 125.

In the terms of this study, however, the apparently reforming and revolutionary *Law of the Constitution* becomes of vital interest in that its paradoxically conservative approach to the governing institutions of UK social and political life determined that the positivisation of the UK Constitution and British law would once again do little to remedy the incongruent status of the individual Briton; first, resisting contractarian government and placing (positive political) sovereignty in the hands of political institutions rather than the British people; and secondly, still rejecting any positive expression of individual liberty—relying instead upon a self-limiting political community to ensure the maintenance of a wide private sphere of non-statal personal autonomy.

3.1. Positivism, Utilitarianism, Pragmatic Liberalism and Conservative Institutionalism

Dicey was to take up his constitutional pen in the late 19th Century. Accordingly, he was not simply to be influenced by momentous social and political events such as the Reform Acts, household suffrage, the growth of party politics, Catholic and Jewish emancipation, the demand for female suffrage, and the rise of chartism and the Labour Party. Rather he was also indelibly to be marked by the political philosophy of his time, and in particular by the as yet unresolved theoretical conflict between British utilitarianism, liberalism and collectivism.[149] This interplay between radical socio-political forces and curiously incomplete philosophical advance, gives the key to Dicey's work. On the one hand, responding pragmatically to the inexorable political demands of his age, Dicey was a positivist and radical reformer, who drew heavily upon the doctrines of utilitarianism, and so sought to expunge the British constitution of the relics of a pre-political monarchical age: first, dispensing with Blackstone's regal and intermediary 'supreme magistrate' and locating supreme sovereignty in the hands of the political community; and secondly, relinquishing the claim of the common law that it derive its authority either directly from the Monarch, or from higher natural principles. On the other hand, however, his was also a deeply conservative view of the British constitution. Although he shared much in common with J.S. Mill, and was thus a somewhat indivdualistic liberal at heart,[150] the political philosophy of his age had yet to supply Dicey with a convincing mechanism to overcome the

[149] J. Gray, *op cit*, n 17.

[150] See his eulogy of J.S. Mill (and to a lesser extent of the rationality of his utilitarian father), *Law and Opinion in England*, (R. & R. Clarke: Edinburgh, 1930), 422-432.

collectivist tendencies of the utilitarianism from which Mill's liberal individualism had sprung;[151] and accordingly, he was pragmatically to resort to deeply reactionary methods to lessen the danger that the sovereign British political community would infringe upon the liberty of the individual Briton.

Dicey accordingly becomes of interest to this study, not merely since he departed from certain of Blackstone's prescriptions and so seemingly gave rise to a British political community resembling an illiberal *polis*, able autonomously to rule upon and to determine every facit of social and political life in Britain. But equally, since he remained unconvinced that entrenched individual rights were an appropriate or effective foil to unwarranted collectivist tendencies, and instead chose to retain certain of Blackstone's institutional mechanisms to limit the powers of the political community. Once again, the protection of the residual liberty of the Briton, or Mill's limited government, was not to be a matter of positive rights, with a constitutional judiciary explicitly weighing up collective against individual interest, but was instead pragmatically to be secured through an institutional conservatism which set severe limits upon the political community: the Briton was thus not be incorporated, but to be represented within a body politic, which was still to be predicated upon the preservation of privilege and the paternalistic weighing up of the national interest.

This harnessing of pragmatic liberalism with institutional conservatism, thus seems in the field of British citizenship to lead to the rather interesting conclusion that whilst post-Dicey, everything would seem to have changed—the shift had in fact been rather small. Ultimately, though seeming to differ radically from the traditionalist and naively 'romantic'

[151] To engage very briefly in philosophical considerations, the difficulty in Mill's individualistic liberalism be its resort to a utilitarian notion that that collective law be admissible only if it not do 'harm' to individuals, so creating an 'absolute' liberal value and denying the possibility that (in a somewhat Rawlsian construction) social justice might be secured through the on-going redefinition of rights through the weighing of collective and individual interest, J. Gray, *op cit*, n 17. Returning to Dicey, however, it is in fact unlikely that such theoretical consideration were the direct cause of his rejection of positive rights—after all, the weakness in Mill was only later to become apparent—Rather his rejection of positivised individualism seemed to derive from the simple fact that he had looked at continental schemes of positivised rights and found them wanting in practice—see in particular his comments on the Swiss, *Law of the Constitution*, *op cit*, n 125.

Blackstone,[152] representing instead the rational, radical and reforming forces of a 'scientific age,'[153] Dicey's achievement, if not necessarily his goal, was much the same as that of his predecessor: institutional atrophy and continuity in the status of the individual Briton.

3.2. Radical Utilitarianism: the Sovereign Political Community

To begin, however, with Dicean radicalism. Dicey's faith in positivism, and the utilitarian creed that each and every exercise of sovereign power in the United Kingdom need be directly traceable to the will of the political community, and might no longer be derived from any pre-political monarchical dictate or higher natural authority, necessitated two crucial alterations to Blackstone's constitutional scheme of government. A scientific age had seen the undisputed triumph of 'politics,' and accordingly, the interrelated notions that the people's representative sovereignty resided in a regal 'supreme magistrate,' who had in turn delegated certain of his prerogatives directly to a judicial cadre needing no political legitimation, were to be identified as relics of a bygone age and consigned to the constitutional dustbin; the same fate seemingly being reserved for the claim that common law be a natural law, deploying precedent to enforce pre-existing principles with a 'higher value' than politically-determined law. No longer was a division to be made between the representative sovereignty of a monarch and the legislative sovereignty of a parliament. Rather, sovereign power within the United Kingdom was from now on exclusively and inexorably to be reserved to a Parliament,[154] from which the common law was also to derive its authority.

a) The Sovereign and Constitutive Parliament

Establishing the undisputed sovereignty of the Sovereign in Parliament, or creating a Parliament which 'might do anything save turn a woman into a man,'[155] Dicey sought to remedy Blackstone's mythological perversion of

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[152] Most particularly in relation to the myth of the Saxon polity, but also in relation to notion that justice in the UK sprang from the throne, '[N]o one, indeed, but a child believes that the King sits crowned on his throne at Westminster, and in his own person administers justice to his subjects,' *Law of the Constitution*, *op cit* n 125

[153] *Ibid*, lxii.

[154] Presumably, the notion of the Crown was now to be understood as an administrative one, officers of the Crown merely administering the executive power of the Parliament.

[155] Cited by Dicey. in. *Law of the Constitution*, *op cit* n 125

contractarian government, dismissing as fanciful the notion of a paction between a sagacious Saxon polity and their King. Wisely in age of rational politics and increasingly radical democracy, the idea that the British people had some nine centuries earlier irrevocably transferred their sovereign power to a benign Monarch who graciously shared his (representative) power with a Parliament, was one which was quickly to be dispensed with. Accordingly, the intermediary concept of the sovereign 'supreme magistrate' was to pass peacefully out of the British constitution.

Vitally, however, Dicey chose not to replace Blackstone's contracting moment with one of his own. Rather than identify the time at, or the conditions under which, Britons had transferred their power to the British state, he merely shifted the existing location of sovereignty, placing it firmly in the hands of the Sovereign in Parliament. Such a move was to have two vital consequences: the first, the creation of a constitutive as well as legislative parliament; the second, the politicisation of law, or the determination that all authority in Britain derive from political processes and the political community.

To begin, however, with the constitutive parliament. As Tocqueville was to note, in the absence of Saxon paction, the failure to place either popular or constitutional restrictions upon the sovereign power of the Parliament, made that Parliament 'both a legislative and constitutive assembly.'[156] Dicey was to confirm this description, identifying it as:

> a convenient formula for summing up the fact that Parliament can change any law whatever. Being a legislative assembly it can make ordinary laws, being a constituent assembly it can make laws which shift the basis of the constitution.[157]

In other words, Dicey had knowingly created a legislative despot which might if it wished overturn individual rights, restrict civil liberties or simply 'condition and subvert society to its own ends.'[158] Such a construction would thus seem logically to conflict with his passionate adherence to individualism. However, it was nonetheless to form the vital plank in his mission to rationalise the British constitution, since through it he was to positive and politicise all acts of law-making and to ensure that all authority in the United Kingdom be directly traceable to the will of the political community: if there be but one sovereign power in the UK, and that be Parliament, then any legitimate exercise of state power, be it by policeman, state official or Judge, be an expression not of any higher or

[156] *Law of the Constitution*, *op cit*, n 125, at 84.

[157] *Ibid.*

[158] This indeed being Charter 88's view of parliamentary sovereignty, *infra*, n 74.

natural principles, or of regal whim, but of the will of the political community. In short: the final confirmation of the utilitarian creed that all law be man-made and need be politically legitimated.

b) The Rationalisation of the Common Law

Clearly, Dicey's mission likewise necessitated a radical reformulation of the claim of the common law to legitimacy. The common law, still vigorous and active outside the sphere of parliamentary legislation, remained the nemesis of the utilitarians: Bentham dismissing it as a 'sham law' and a 'thing purely imaginary.'[159] Dicey's attempts to enclose it within his positivistic and politicised scheme of government, however, were two pronged: being based first, on the debunking of the notion that common law be a higher and perfect natural law, preserved through precedent; and secondly, upon the prosaic argument that since the Judicature Acts of 1873, its jurisdiction and thus political legitimacy had been confirmed by Parliament.

The relinquishing of the claim of the common law to be a natural law was once again an astute response to the scepticism of a time of science and reason. It was similarly a painful act for a professional body which had long worshipped naturalistic heroes such as Bacon and Coke. Dicey nonetheless made the transition less painful, arguing that whilst Lord Coke's appeals to natural principles and precedent in his battles with Monarch and Parliament had been based on 'pedantic,' 'artificial' and 'unhistorical' reasoning, 'the obstinacies and fallacies of the Lord Chief Justice' had nonetheless entailed an act 'of great statesmanship,' securing liberty and the constitution at a time of crisis.[160] Natural law promulgated through the 'fiction' of precedent was simply a means whereby 'judicial decision conceals its transformation into judicial legislation,'[161] and thus might claim no legitimacy in age of positive law. Nonetheless, its political and constitutional worth in preserving liberty had oft been proven, and such gallant legal activities had now been recognised and retrospectively legitimated by the parliamentary determination of the jurisdiction of the common law. Alternatively, whilst the Courts no longer directly disposed of the monarchical prerogative, insofar as their endeavours were tolerated and confirmed by the Parliament, they had now been firmly drawn within the sphere of politically legitimated law.

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[159] *Supra*, n 57.

[160] *Law of the Constitution*, *op cit*, 125, at 18.

[161] *Ibid*.

3.3. Institutional Conservatism and Dicey's Rule of Law

Dicey's achievement in positivising and politicising the British constitution and scheme of law and Government in the United Kingdom might not be underestimated. British constitutional writing had long-suffered from a remedial romanticism which had obscured the simple fact that much of the supposed constitution was logically inconsistent, theoretically untenable and subversive of 'legitimate' political power.[162] In Dicey's own words, any ardent student of constitutional law and history would thus find himself:

> in a sort of maze in which the wanderer is perplexed by unreality, by antiquarianism, and by conventionalism.[163]

Even the great Blackstone had succumbed to such mysticism, and through the 'unrealities of his language,'[164] had masked simple facts of law and the failings in the constitution, and had so contributed to the curious complacency of an English constitutionalism which allowed George III to encapsulate the views of constitutional writers such as Hallam and Burke, in one simple phrase: 'it [sic. the constitution] was the most perfect of human formations.'[165] Alternatively, in Dicey's summary:

> it was to them not a mere polity to be compared with the government of any other state, but so to speak a sacred mystery of statesmanship; it had (as we have all heard from our youth up) not been made but had grown; it was the fruit not of abstract theory but of that instinct which ... has enabled Englishmen ... to build up sound and lasting institutions, much as bees construct a honeycomb, without undergoing the degradation of understanding the principles on which they raise a fabric more subtly wrought than any conscious work of art ... ; no definite body of persons could claim to be its creators, no one could point to the document which contained its clauses; it was in short a thing by itself, which Englishmen and foreigners alike should venerate where they are not presently able to comprehend.[166]

Mysticism, however, was not a trap into which Dicey would fall. Instead, in an age of reason and science he would reject 'legal formalism,' or the claims of lawyers that they be establishing government or the

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[162] Dicey's first concern in the *Law of the Constitution*, thus being the debunking of all historical, and legal mythologies of the constitution, *op cit*, n 125, 'The True Nature of Constitutional Law,' 1-36.

[163] *Ibid*, 7.

[164] *Ibid*, 11.

[165] *Ibid*, 2.

[166] *Ibid*, 2-3

constitution in accordance with a mythological scheme of pre-existing 'natural' principles; would circumvent 'antiquarian' mysticism; would explicitly refuse directly to discuss or judge political constitutional theory;[167] and would so peel away all romantic pretence and reduce constitutional law to a simple matter of the 'rules which directly or indirectly affect the distribution of the exercise of the sovereign power in the state.'[168] The sole 'duty ... of an English professor of law' was the pragmatic task:

> to state what are the laws which form part of the constitution, to arrange them in their order, to explain their meaning, and to exhibit where possible their logical connection.[169]

Expunging from his work, the laboured philosophy and unconvincing mythology which characterised so much of the *Commentaries*, Dicey positivised and rationalised the constitution. Existing constitutional arrangements were simply schematically to be identified, enumerated and laid down. In rationalising and positivising, however, he also chose to describe constitutional law in such a manner as to effect the vital shift in sovereignty which would appear to determine that all law and authority in the United Kingdom now be politically legitimated. The least complacent of constitutional thinkers, Dicey recognised that his radical age would no longer tolerate vague and unconvincing justifications for the exercise of authority, and so reformulated and presented the 'facts' of the constitution in a manner acceptable to the increasingly powerful political community.

Given such radicalism, the claim that Dicey had done little to alter the constitutional status of the individual Briton, may initially appear to be surprising. However, support for such an argument might immediately be found in Dicey's positivistic claim to be merely enumerating the *existing* laws of the constitution.[170] In other, words, there is in Dicey an inherent degree of constitutional continuity. His rationalisation did not entail the demolition and reconstruction of the British state and government. Instead, whilst he was to make some fundamental alterations to underlying constitutional philosophy, shifting power between 'constitutional' institutions, he was nevertheless to leave such institutions intact. Equally,

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[167] 'I Find these matters too high for me,' *Law of the Constitution, op cit*, n 125, at 20.

[168] *Ibid*, at 22.

[169] *Ibid*, at 31.

[170] Alternatively, Blackstone was incorrect and Dicey was right, not since the constitution had meanwhile undergone massive institutional change, but since Blackstone had not correctly described existing constitutional law.

however, the simple fact that he was able to deploy positivistic reasoning to allow for the inclusion of utilitarian notions of parliamentary sovereignty within existing constitutional arrangements, at once demonstrates that he shared Blackstone's notable ability to present law in a manner reflective of his own philosophical convictions.[171] Accordingly, it may be argued that in order to satisfy his own liberal desire to limit the powers of the political community, he was to confirm various of Blackstone's constitutional institutions and mechanisms, and so was to leave the status of the individual Briton, and the relationship between the Briton and the British state, much as it had been. Vitally, however, the same may be said for the Dicean concept of the rule of law. Dicey's continued reliance upon a rule of law, policed by the common law, as a mediating tool between the exercise of state power and individual rights, and his explicit concern that such a rule of law be being placed under pressure by the increase in interventionist government, likewise betrays his overwhelming preference for limited or residual government.[172] In other words, Dicey too, may be argued to have viewed the Briton as being somehow independent from the state, enjoying a large sphere of autonomous action; a private area in which the common law was *de facto* substantively to regulate social and economic relations.

a) The Limits to the Political Community

Although committed to liberal principles of individual liberty, Dicey was far from being a radical democrat. Parting company with J.S. Mill, he was deeply distrustful of demands for an increase in the extent of the franchise. Tracing such politically universalist sentiments to the unfortunate decline in support for utilitarianism's rational notion of individualism, and a 'popular error' which had seen a resurgence in 'doctrines of natural rights,' he dismissed demands for direct and immediate political participation—inexplicable in a 'scientific age'—as being no more than a manifestation of a 'superstitious' faith in 'the maxim *vox popoli vox Dei*.'[173] His disdain for political universalism, best demonstrated by his censure of Mill's advocacy for the ill-advised cause of

[171] Cf, to Blackstone's legal-philosophical adeptness, Duncan Kennedy, 'Blackstone's Commentaries,' *loc cit*, n 97.

[172] *Law of the Constitution*, *op cit*, n 125, at xxxvii, *et seq*.

[173] *Ibid*, lxii.

female suffrage,[174] was happily nonetheless to leave no lasting impression upon the breadth of political citizenship in the United Kingdom.[175] Crucially, however, the reasons underlying his distrust for forms of radical democracy, and his more subtle constitutional mechanisms for the control of the political community, were indelibly to mark the British constitution, and thus continue to determine the status of the individual Briton, and the relationship of Britons with the British state, to this day.

Taken together with his ardent belief in individualism, Dicey's deployment of rational utilitarianism to update and de-mythologise the British constitution, presented him with a central difficulty: potentially, Austin's sovereign political community was an unfettered despot, able to determine every facet of social and economic life in Britain, and even to disrupt the liberal sphere of personal autonomy.[176] Theoretically, mechanisms such as the 'internal' and 'external' limits to sovereignty might aid in reducing such a danger: the internal limits being the sovereign political community's sensible desire to refrain from acts it could not successfully carry through;[177] the external limits being its regard for public opinion, or its desire not to offend the tolerance of the public (electors).[178] Vitally, however, such theoretical restrictions on the sovereign power did not of themselves seem to be an adequate brake upon the growing collectivist, and even 'socialistic' tendencies of the 19th Century British polity[179]

In explanation: though undoubtedly rational, utilitarianism's primary tenet that law be legitimated by its attempts to increase the welfare of as many man as possible, determined that it also contain the seeds of a collectivism, not only hazardous to individual liberty but even promoting

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[174] Women were seemingly to be denied the vote for the simple reason that there were inescapable 'differences of biology' between men and women, *Ibid*, lxix.

[175] Female suffrage being effected by the Representation of the Peoples Act 1919. As an interesting aside A.J.P. Taylor argues that the enfranchisement of women in the United Kingdom owed little to the eventual triumph of liberal and natural philosophies which saw *all* men (*ie*, including women) as being inherently equal, and thus worthy of equal political voice. But was instead no more than a mere reward for industrial and social services rendered during WWI, *English History 1914-1945*, (OUP: Oxford, 1965).

[176] A failing recognised by Austin himself, reported by Dicey, *Law of the Constitution*, *op cit*, n 125, 37, *et seq.*

[177] Presumably, such as turn a man into a women.

[178] *Law of the Constitution*, *op cit*, n 125, at 37 *et seq.*

[179] *Law and Opinion in England*, *op cit*, n 179.

of 'socialistic' leanings.[180] The risk that a notion of aggregate, or common, welfare might no longer be construed as simply meaning the common pursuit of the liberty of individuals,[181] and would instead take on a collectivist hue, had in Dicey's view become a very tangible one. The Edwardian Sovereign Parliament thus seemed dangerously close to disturbing the central principle that political intervention should serve 'nothing but the defence of individual liberty,'[182] and had indeed already embarked upon an ambitious programme to secure collective welfare goals; a programme comprising Factory Acts, Public Health Acts, Working Class Housing Acts, and most notable of all, Asquith's social insurance programmes.[183]

Dicey's warnings about the dangers of the short-term pursuit of seductive collectivist welfare above the long term-pursuit of the common good through the preservation of individual liberty, were explicit:

> The beneficial effect of State intervention, especially in the form of legislation is direct and immediate, and so to speak, visible, whilst its evil effects are gradual and indirect, and lie out of sight.[184]

Vitally, Dicey was no mere supporter of *laissez-faire* economics, and based his argument that collectivism might be destructive of common welfare, upon far more than the mere political consideration that should a British government overly regulate shipping, 'few ships will set out on their voyage.'[185] Instead, overeager collectivism was identified as being a sure danger to the most fundamental of British rights and liberties, including contractual freedom, and was thus deemed to be disruptive of all common welfare. The interventionist legislator who did 'not believe in the wisdom of leaving each man to settle his own affairs for himself,'[186] should not forget that he be undermining the very civic rights which had given birth to the post-feudal and autonomous Briton, and thus to the notion of

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[180] *Ibid*, Dicey recognising British socialism's debt to English utilitarianism, 'Modern socialism inherits from Benthamism,' 303-310.

[181] *Ibid*, as Dicey claimed it had been in the time of Benthamite 'individualistic' utilitarianism.

[182] *Ibid*, 261.

[183] Legislation running from the mid-19th Century to 1911.

[184] *Law and Opinion in England*, *op cit*, n 179, 257.

[185] *Ibid*.

[186] *Ibid*, 264.

political community itself: '[C]ollectivism curtails as surely as individualism extends the area of contractual freedom.'[187]

The stakes were high indeed, individual freedom was under immediate threat, and accordingly the need for mechanisms to limit the extent of nascent political collectivism was an imperative one. However, the most obvious of such mechanisms,—or at least, the most obvious to a modern mind—the constitutional incorporation of the state, and the subjection of the sovereign power, or political collective, to the limitations of higher individual rights, was to Dicey no more than a dangerous illusion: he had studied the results of the French Revolution and he did not like them. The 'unlimited scorn entertained by every Benthamite for the social contract and for natural rights' had undoubtedly been a 'guarantee against sympathy with Jacobinical principles.'[188] However, as even Dicey was to recognise':

> it had deprived individual liberty of one of its safeguards. For the doctrine of innate rights, logically unsound though it may be, places in theory a limit upon the despotism of the majority.[189]

Nonetheless, the United Kingdom should be grateful that is had been so deprived, since such rights were in essence 'a very feeble barrier against the inroads of popular tyranny,'[190] and were thus fostering of a dangerous complacency. Written rights could not of themselves secure liberty:

> the Declaration of the Rights of Man did not save from death one among the thousands of innocent citizens dragged before the Revolutionary Tribunal; the American Declaration of Independence, with its proclamation of the inalienable rights of man, did not deliver a single negro from slavery.[191]

Resisting the temptation to ascribe Dicey's dislike of innate rights to his fear that theories of natural right would lead to a universal political

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[187] *Law and Opinion in England*, *op. cit*, n 179, 264.

[188] *Ibid*, 309.

[189] *Ibid.*

[190] *Ibid.*

[191] *Ibid.* Though Dicey fairly recognised the effects of such documents upon public opinion in France and the States: 'The have assuredly affected public opinion. In France the declaration of the Rights of man has kept alive the conviction that a National legislature ought not to possess unlimited authority. Some articles in the Constitution of the United States inspired by the sentiment of the Declaration of Independence, have supported individual freedom; one of them has gone so far to make the faith that the obligation of contracts is sacred, a part of the public morality of the American people, and does at this moment place a real obstacle in the way of socialistic legislation.'

community and so merely accentuate the problem of collectivism,[192] it might thus be argued that he chose to reject constitutional incorporation and higher rights as a means to control the political collective, for a far more altruistic reason: he simply felt that normative limits to sovereign power were not of themselves effective, and that more practical political constitutional mechanism would be a better guarantee of the individual Briton's liberty.

Hence, the assertion that Dicey chose to promulgate a pragmatic form of liberalism,[193] or a strategy designed to curtail the dangers posed by collectivism, through institutional conservatism, or the retention of certain of Blackstone's prescriptions for 'good,' or limited, government.

Reviewing the *Law of the Constitution* from this perspective it thus at once becomes apparent that in refusing to incorporate the individual Briton within the British body politic; rigidly rejecting proportional and instead supporting district-based representation[194]; confirming that the House of Lord's rejection of various Common's proposals, had 'protected the authority of the nation'[195]; and applauding the rationality of Members of Parliament who did not merely reflect the views of their constituents[196]; Dicey had returned to Blackstone's scheme of distancing the individual Briton from the business of politics, and instead providing that he be represented within a paternalistic body politic which would wisely legislate in the interests of the national community. The legislature would form the opinions of Britons and not *vice versa*.[197] Even the most radical of utilitarians should admit of the pragmatic philosophy that were there was doubt 'whether the citizens of a given country were sufficiently enlightened to understand their own interests,' 'the rule of an intelligent despot or of an intelligent minority' was to be preferred above the rule of

[192] A temptation nonetheless somewhat justified in view of his statement that the doctrine of natural rights be a superstitious popular error, *supra*.

[193] Though of course, in view of his apparent dislike of natural rights it may be doubted that he be a liberal at all. Nonetheless, the pragmatic epithet liberal, rather than individualistic utilitarian is more appropriate for Dicey, since he was to preach the creed of civic (if not political) equality, through his continued support for Blackstone's rule of law, *infra*.

[194] *Law of the Constitution*, *op cit*, n 125, lxv, *et seq*

[195] *Ibid*, xxi.

[196] Somewhat ironically, with specific mention of J.S. Mill's support for female suffrage, *Ibid*, lxv.

[197] Being the entire message of the book, *Law and Opinion in England*, *op. cit*, n 179.

an unintelligent majority.'[198] Alternatively, government be a matter of sagacity, with the measure of the wisdom of 'good' government being its ability, through the 'reason' of the sagacious men gathered together within the body politic, to distinguish between measures conducive to individual liberty and those merely productive of short-term collective welfare, and so to pursue true rather than illusionary common welfare.[199]

b) Dicey's Rule of Law

Finally, attention need be focused upon Dicey's notion of the rule of law. First, Dicey's pivotal confirmation that rights in the United Kingdom be secured by 'the ordinary courts of the land'[200]; secondly, his assertion that;

> [I]n England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary Courts has been pushed to its utmost limit[201];

and thirdly, his famous residual formulation of personal liberty as meaning

> in substance a person's right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification[202];

all confirm that Dicey adhered to Blackstone's view of the rule of law as a mediating notion between rights and power.[203] Policed by the common law courts, the rule of law continued to determine that should an act not be traceable to the sovereign power, it would be classed as a private action and therefore be subject to the sanctions of the Judges.

In other words, for all of his disdain for the natural principles and the 'artificial,' 'unhistorical' and 'fallacious' reasoning of the common law, Dicey was happy to confirm the principles of right and justice it had

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[198] *Ibid.*

[199] It is, however, important to note here that in all fairness, Dicey did not regard instruments such as Trade Unions as being destructive of common welfare—rather a wise Parliament had allowed the common man to collectivise his political interests in such a manner that is not be destructive of public liberty, *Law and Opinion in England*, *op cit*, n 179.

[200] *Ibid*, at 203.

[201] *Ibid*, at 189.

[202] *Ibid*, 20-204.

[203] Or at least in Duncan Kennedy's appraisal, 'Blackstone's Commentaries,' *loc cit*, n 97.

historically established, and to entrust to it the pivotal task of balancing relations between the state and individual Britons, as well as between individual Britons themselves. This, however, raises two final points of interest: the first, being the possibility that Dicey still envisaged of a very wide role for the common law, with the Courts playing a major part in regulating relations between Britons outside the sphere of governmental intervention; and the second, being the large question mark hanging over Dicey's assertion that the common law no longer rely on natural or customary principles for its legitimation.

To begin, however, with the particular—private—role of the common law in Dicey's scheme of government in Britain. Dicey's view that state intervention need be restricted to the preservation of liberty, seems to be a modern confirmation of Bacon and Blackstone's earlier devaluation in the role of the state and its law: it was there merely to preserve man's liberty through the maintenance of social order. The flip side of this construction, however, being the fact that the individual Briton was thus to be afforded a large sphere of personal autonomy in which he might determine his own social and economic relationship. Although the 'wise' state be unwelcome in this sphere, the common law, however, was not: it, through the rule of law, would seek to ensure that the individual Briton remain civil amongst themselves and not infringe upon each other's liberties.

This of course, raises the interesting question of whether it be convincing to claim that in this, its essentially private role, the common law was politically legitimated. Certainly, in that Parliament had set the limits to its jurisdiction, it might claim some form of formal legitimacy and connection to the sovereign political power. However, in that it was daily formulating new principles and responding to the pragmatic need of society for new solutions to new problems, might this substantive process of law-making be said to have any on-going political legitimation? However, rather than directly tackle this point—and the weaknesses in Dicey's reasoning—here mention will only be made of the fact that common lawyers themselves appeared to have taken lesser note of the need to rationalise their law, and continued, and continue to this day, to claim a non-political legitimacy for the substance of their law-making: whilst natural principles are less often called upon,[204] precedent, or the claim that the law be using strictly rational methods to preserve and perfect, through

[204] Though still forming the basis for equitable law. An example being the natural maxim: 'you must to equity with clean hands.'

rational reasoning, the customary law of British society, still plays a vital role in common law thinking.[205]

3.4. Conclusion

Dicey's *Law of the Constitution*, readily supplies the answer to the question of why Blackstone's nascent liberal constitution was never to evolve into a full-blown liberal construction, encompassing positive individual rights which would supply an explicitly normative forum for the balancing of collective and individual interests. Such an answer, however, does not derive from the fact that by virtue of his disdain for notions of inherent or natural rights, Dicey's liberal credentials might indeed be doubted. Rather, his assertion of the absolute civic equality of the Briton under the rule of law, confirms that Dicey's was indeed the liberal pre-occupation with the balancing of individual right against social or collective welfare. Dicean constitutional atrophy, instead derives from his preference for the protection of individual rights through pragmatic political restrictions upon the extent of the sovereignty of the political community. Good government, prepared to restrict itself to securing individual liberty, would serve the individualist liberal cause better than positive rights. Reasoning and reasonable men would be best placed to determine which measures of collectivist welfare were damaging to individual liberty and which were not. Accordingly, Blackstone's ready made constitutional mechansims to restrict the body politic to wise men, were to be revived and confirmed. The potential folly of a sovereign legislature was to guarded against by the careful restriction of the polity to the aristocratic House of Lords and the representative House of Commons.

All this of course determined that the position of the individual Briton was not to change greatly. Though Dicey had presumed to serve the cause of utilitarianism, he had ultimately perverted it, refusing to admit of its logical conclusion: radical democracy.[206] The Briton was not to be incorporated within the British state. Instead, he was to remain autonomous from it, being represented rather than included within the polity. Equally, however, he was also to enjoy a large sphere of

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[205] A.W.B. Simpson, 'The Common Law and legal Theory,' in *ibidem*, Legal Theory and Legal History: Essays on the Common Law, (The Hambledon Press: London, 1987). Equally, however, Dicey clearly failed to convince political thinkers of the political legitimacy of the common; see the scepticism of Laski, *Parliamentary Government in England, op cit*, n 68.

[206] Although this was always also a problem to the utilitarians themselves.

autonomous action; a private area which, for all Dicey's protestations to the contrary, was still to be regulated by the substantive and precedent-based jurisprudence of the common law.

Finally, in the matter of who might be a Briton, *Calvin's case*, and to the extent that the common law still continued to reason through precedent, its underlying natural principles, was determinative. The regulation of Britishness through a hierarchical and pre-political notion of monarchical allegiance was thus to remain tenable in a modern British age. Nationality law need contain no element of voluntarism since inclusion within the British people still did not necessarily entail inclusion within the British polity.

C. Conclusion: Rousseau Rejected

The examination of the philosophical thought which was to find its way into constitutional thinking, and so was to determine the position of the individual Briton and to govern relations between Briton and British State, leads to the inevitable conclusion that the United Kingdom had rejected almost every one of Rousseau's philosophical prescriptions for the *Citoyen*. Leaving aside the possible connection between the natural law principles which secured Calvin's status as subject and those which led French revolutionaries to wrestle power from a despotic monarchy, the story is one of divergence. Britons existed by simply virtue of organicism, and were not created through a voluntaristic act. The Briton was not to be incorporated, but was simply to be represented within the British body politic or state. Equally, however, the Briton was never to be viewed as being synonymous with the state, but was instead to enjoy an existence autonomous from it. Similarly, neither was the Briton to be protected by positive rights, nor might he claim to have politically influenced all the laws under which he lived. Rather, the protection of his liberty was to be based on a curious concordance between a natural and customary common law and a self-restraining political community. Finally, the natural enemy of the French citizen, the aristocrat was alive and well within the British polity, not only in the character of hereditary peers, but also in that of the life peers and parliamentary representatives, chosen (or at least supposed to be chosen) by virtue of their imputed characteristics of wisdom and reasonableness.

As a final note, however, this was the *ancien* polity upon which the radical Labour government of 1945 was to attempt to graft its new notion of industrial citizenship. In other words, an explicitly collectivist political

party was thus to pursue its goal of social and substantive inclusion through the structure of a sovereign, paternalistic yet potentially despotic Parliament. By the same measure, the balancing of its collectivist programme of social welfare against individual rights, was not to take place in the courts by means of the on-going definition of neutral normative rights, but was instead to become a matter of party politics in the House of Commons, and ultimately a brute struggle between classes and ideologies. This, however, leads to the second theme to be tackled by this study: the inherent instability of the constitutional moment of 1945, and the ultimate demise in industrial citizenship.

III. Industrial Citizenship: The Unstable Constitutional Moment

As noted, 1945 and the immediate post-war years might fairly be argued to represent a 'constitutional moment' in British history. The landslide electoral victory of a radical and reforming Labour Government, an overwhelming political commitment to a notion of joint (national) ownership of wealth, the pursuit—by both successive Conservative and Labour administrations—of nationalisation programmes, the establishment of universal health, welfare and educational provision: all constituted the explicit creation of a 'Welfare State' which was to bring with it its own corollary notion of 'industrial' or 'welfare' citizenship, and was thus to seem at last to represent the refashioning of the British state and polity along openly egalitarian lines.

Crucially for the purposes of this study, however, this restructuring of British society and the materialisation of the institutions of British governance was very much a political rather than formal legal/constitutional occurrence. To be sure, the radical re-alignment in notions of social structuring and government which saw Britons enveloped in a welfare cocoon from 'cradle to grave,' was accompanied both by a vast increase in legislative and administrative activity[207] and a concomitant acceptance by the common law (and Scottish law) of various substantive

[207] Determining that UK political and legal debate would likewise be marked by the same concerns about the democratic accountability of and respect for personal rights exhibited by a top-heavy administrative state, which were characteristic of the history of most post-war western countries, cf, P. Craig, *Public Law and Democracy in the United Kingdom and the United States of America*, (Clarendon: Oxford 1990).

principles of social justice.[208] However, the British polity's seemingly overwhelming preference for the pragmatic political pursuit of notions of joint wealth 'ownership' above a normative commitment to the pursuit of wealth 'distribution' via concretised (higher) social rights or the constitutional formalisation of the *Sozialstaat*, proved to be determinative;[209] dictating that British social renewal was to be less a matter of constitutional upheaval—or a fundamental re-appraisal of the philosophical/normative foundations of the British State and Citizenry—and more one of the political pursuit by the Sovereign Parliament of various social, and on occasions simply expedient, policy goals.

This emphasis upon the predominance of politics and the political community within the post-war UK constitutional moment thus furnishes the key to this second section upon the modern status of the individual Briton, or the post-war 'deep' concept of UK citizenship. First, on a somewhat negative note and in the absence of constitutional upheaval—and/or constitutional thinkers to rival Dicey—the formal constitutional relationship maintained between Briton and British State would perversely appear to have altered little: the most telling manifestation of this constitutional atrophy being a radical reworking of British nationality and race relations law which, though by-and-large maintaining a universalist basis for belonging, nonetheless showed little or no regard for modern concepts of contractual voluntarism or the positively constituted state and (rights-bearing) individual (III.A). Secondly, though somewhat more speculatively, a constitutional moment founded not on secured normative pillars but rather upon highly contingent political processes, would also appear to have been inherently unstable: the lamentably precipitous decline of industrial citizenship being highlighted during a brief discussion of the pluralist critique of the collectivist foundations of the UK Welfare State (III.B). And thirdly, in a far more positive mood, its idiosyncrasies and faults notwithstanding, the post-war 'deep' concept of UK citizenship would nevertheless appear to offer some positive lessons in the matter of current attempts to evolve new notions of citizenship suited both to a post-

[208] Though once again, in comparison with many of its continental counterparts, the private law of the UK was somewhat of a 'materialisation laggard'—an example here being the relatively late acceptance of principles of consumer protection in contractual law (UCTA dating only from 1977).

[209] Marking the essential difference between the British Welfare State and Scandinavian or continental welfare models, cf, G. Esping-Andersen, *The Three Worlds of Welfare Capitalism*, (Polity Press: Cambridge 1990).

statal world. The notion of UK citizenship thus appears to offer a 'non-statal' blueprint for citizenship of the European Union.

A. Nationality, Race and Constitutional Atrophy

Though not a product of the transition to a Welfare State, and instead a simple result of the UK's declining colonial role abroad and a corollary demand for the regulation of troubled race relations at home, the history of the reform of nationality law and the evolution of a comprehensive legal framework for the suppression of racism, is nonetheless indicative of the general post-war trend which saw major social upheavals effected without prejudice to the underlying normative foundations of the UK Constitution. Just as the inherent social inequality of the Briton[210] was not to be tackled through an inspirational call to higher and 'equalising' civic and social rights and was instead to be secured through the prosaic efforts of commonly-owned redistributive institutions such as the nationalised industries and Health Service. So too, were the foundations of British nationality to be overhauled via political edict rather than the re-constituting of the British state. Meanwhile 'good' race relations were not to be a momentous matter of a constitutional commitment to equality, but were instead a simple issue of the strengthening of the rule of law within a private sphere of social interaction in order to combat discrimination on the basis of 'race, nationality or ethnic origins.'[211]

Generally seen as being intimately intertwined[212]—nationality law almost exclusively being used as an immigration policy instrument to regulate the number of entrants into the UK; with the Race Relations Act[213] likewise seeking to ensure that immigration not result in social upheaval—nationality and race legislation thus exemplifies two defining trends in post-war UK thinking upon the state and relationship of the individual to the state. First, in the matter of the definition of 'Britishness,' the continuing refusal either to constitute the British state or to allow the British people a formally voluntaristic status within the state. And secondly, with regard to immigration and social control, the harnessing of and residual reliance upon the traditional UK and dual governing

[210] And remember this was a social inequality upon which Blackstone's constitution was normatively built, *infra*, II.B.2.1a).

[211] A. Favel, 'Philosophies of Integration,' *op cit*, n 7.

[212] *Ibid.*

[213] 1976.

instruments of paternalistic political leadership and a wide-ranging—and civic—sphere of purely 'private' interaction governed by the 'rule of law.'

1. Nationality: A New Status for New Britons?

While arguably the most fundamental post-war upheaval in British law—though characteristically afforded little or no public attention[214]—the 1948 Nationality Act which brought to an end the common law's ancient role in defining 'Britishness,' was not a result of a positive desire for legal reform and was instead forced upon a reluctant UK Government by the self-governing dominions of the British Commonwealth[215]. As noted by the Lord Chancellor when introducing the 1948 Act which replaced the doctrine of allegiance with a statutory definition of citizenship:

> The Dominions are insisting that we shall not take a different position from them. They create their citizens.[216]

As such, the Act is characteristic of each of the three post war reforms in nationality legislation: all being an immediate response to pressing and particular political problems of decolonialisation and immigration.

Alternatively, the 1948 scheme whereby a new definition of Britishness would rest upon a concordance of legislative action by member states of the Commonwealth, was an answer to the increasing independence of formerly dependent states such as Canada and Australia and their desire both to 'create' their own citizens, and to have free rein over their immigration policies.[217] Accordingly, the new dual scheme of Commonwealth citizenship and United Kingdom and Colonies citizenship would replace the once common—to the dominions and colonies—legal category of British subjecthood;[218] so ending the situation whereby all

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[214] As noted in Parliament: 'The country is almost unaware of the existence of this Bill and certainly totally unaware of its profound significance,' Lord Altrincham, Hansard [House of Lords, 21 June 1948], at 1000.

[215] Cf, A. Dummet/A. Nicol, *Subjects, Citizens, Aliens and Others*, *op cit*, n 71, chapter 7.

[216] Hansard [House of Lords, Vol. 55], at 748.

[217] An element of racism undoubtedly creeping in here: Canada, South Africa and Australia (or the 'white' dominions) having sought to restrict immigration from India since the beginning of the Century, cf, A. Dummet/A. Nicol, *Subjects, Citizens, Aliens and Others*, *op cit*, n 71.

[218] Though reborn in a new form, both UK and colonies citizens and commonwealth citizens becoming British Subjects (or, in alternative terminology, 'citizens of the commonwealth')—a status which still brought with a right for UK residents to vote in UK elections.

individuals born within the British Empire and Commonwealth might move freely from one dominion/colony to another.[219] Similarly, however, the 1971 Immigration Act which introduced the now happily defunct notion of 'patrial' citizenship—to which an immediate right of abode in the UK would attach—seemed likewise to represent the response of a Labour government to calls for a limitation upon the supposedly 'large-scale' immigration of citizens from the remaining UK colonies into the United Kingdom:[220] restricting the entry of UK colony citizens to those with a parent (and in some limited cases a grandparent) born in the UK. Equally, the 1981 British Nationality Act seemed to be a further variant upon this theme of pragmatic immigration control: the Conservative administration's extraordinary five-fold scheme of British citizenship,[221] British dependent territories citizenship,[222] British overseas citizenship,[223] British protected person,[224] and British subjects without citizenship,[225] again being a less than subtle instrument of immigration control—at last severing the Gordian knot with the remaining colonies, and endowing only the first group of 'British citizens' with an automatic right of entry into the UK.

Clearly, at one purely factual level, the post-war reform of UK nationality legislation was largely representative of a general political

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[219] Cf, J. Mervyn Jones, *British Nationality Law*, (OUP: Oxford 1956) at 81-85. Commonwealth citizens being those persons afforded citizenship under the independent law-making competences of the dominions and southern Rhodesia. United Kingdom and Colony citizens being citizens of the UK and colonies on the basis of birth there, birth outside the territories to a father born or naturalised there, or naturalisation on the discretion of the Home Secretary (sections 4, 5, 10 BNA 1948).

[220] A. Favel, 'Philosophies of Integration,' *op cit*, n 7.

[221] Being those born in the UK to parents (British or otherwise) legally settled in the UK, or those born outside the UK with a parent born in the UK under the former conditions.

[222] Being those persons attached (in the sense that British citizens proper are attached to Britain) to the remaining colonies (*ie*, Gibraltar).

[223] Being citizens of the United Kingdom and colonies, who did not acquire British citizenship or British dependent territories citizenship when the 1981 Act came into force.

[224] Order in Council under section 38 BNA 1981, being persons connected with territories which were protectorates, protected states of United Kingdom trust territories. Such persons have the right to a British passport and to naturalisation by registration.

[225] Being British subjects under the 1948 BNA who failed to acquire any other citizenship when the country they were living in adopted new nationality laws. Such persons have the right to a British passport and to naturalisation by registration.

adjustment to the piecemeal decline of the British Empire. In other words, in a post-colonial world, the common law doctrine of allegiance was no longer politically tenable; leading inexorably to a stark disparity between notions of territorial sovereignty and individual national identity. As the Empire slowly withdrew and new sovereign states emerged, the common and extra-territorial notion of monarchical allegiance thus became increasingly inappropriate, hindering the efforts of emerging nations clearly to delineate the particular individuals over whom they had control, and—seemingly more importantly—to whom they were obliged to render the right of residence.[226]

Beyond such pragmatic considerations, however, the reworking of the basis for 'Britishness,' and more particularly the seemingly final rejection of Lord Coke's feudally-flavoured though 'naturally' universal delineation of national belonging on the basis of birth in the Realm and a mutual, albeit hierarchical, relationship between sovereign and subject,[227] likewise raises a vital philosophical/constitutional question. That is, in reworking the basis for the notion of belonging to the (British) state, had post-war reform likewise re-adjusted the status of Britons within the state? Further, had the UK at last dispensed with its outdated adherence to incoherent notions of monarchical allegiance and the curious dichotomy between legal subjecthood and political citizenship; establishing instead a contractual notion of national belonging and a constitutionally coherent concept of the Briton as citizen?

1.1. The Demise of Allegiance: Ethnicity vs Contractualism?

The common law notion of allegiance which governed nationality both in Britain and throughout the Empire/Commonwealth up until 1948, was clearly concerned with far more than the formal identification of British subjects. Rather, with its natural law roots and reliance upon a feudal idiom of organic and hierarchical belonging, it not only expressed the common law's underlying disdain for man-made notions of nation and statehood, but was likewise an accurate reflection of British thinking on the concept of the state and the relationship of the individual with that state. On the one hand, its limited degree of extra-territoriality[228] and

[226] The issue of immigration control not merely dominating UK nationality debates, but likewise being determinative throughout most of the Commonwealth, cf. A. Dummet/A. Nicol, *Subjects, Citizens, Aliens and Others*, *op cit*, n 71.

[227] *Supra*, II.B.1.

[228] Beyond the formal jurisdiction of the common law, *supra*, II.B.1.

universalism were an attempt to re-create the original 'natural law of nations,' and so to ameliorate the exclusionary nature of territorial state law. On the other, the hierarchical relationship it established between individual Briton and Monarch was likewise reflective of the UK rejection of republican notions of citizenship and statehood, or the concept of a state made up fellow-members or citizens. In short: as many individuals as possible were to be afforded the legal protection which the status of subjecthood embodied; such subjecthood, however, would not entail membership of the British state or body politic.[229]

In this, its ability to reflect philosophical thinking on the concept of the state and the relationship of the individual to the state, the ancient doctrine of allegiance thus shares much in common with more modern bodies of nationality law. Although a highly complex body of norms with its own internal rationality, nationality law is nonetheless generally seen as being integral to the state-based concept of the citizen. First, acting as the vital gateway to the enjoyment of material rights of citizenship;[230] and further, its pivotal distinction between *ius soli* and *ius sanguinis*, being no more than the legal manifestation of divergent notions of ethnic and contractual (nation) statehood. In other words, 'the other side of the coin to the enjoyment of material rights'[231] of citizenship, nationality law likewise reflects the two particular bases of national belonging and modern statehood: the first, a backward-looking and exclusionary communitarian concept, restricting national membership and (at the very least) political rights of citizenship to an imagined ethnic and pre-political community existing prior to a state created exclusively to serve its needs; the second, a contractualist concept which is based upon the republican proposition that the state is commensurate with the voluntaristic will of its own citizens, and accordingly adopts an *automatic* and inclusionary approach to the bestowal of the full range of citizenship rights upon its nationals. In other words, in this the contractual scheme of statehood, nationality equals citizenship.

Seen in this light, the final demise of the common law doctrine of allegiance is not merely interesting in its own right, but also begs the question of whether the UK had finally adopted a modern form of

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[229] *Supra*, II.B.

[230] Preuß, 'Zum verfassungstheoretischen Begriff des Staatsbürgers in der modernen Gesellschaft,' *loc cit*, n 64.

[231] Preuß, 'Citizenship and Identity: Aspects of a political Theory of Citizenship,' ms, Bremen 1993.

statehood and if so which one. In other words, a natural conception of the Briton which had long sought to maintain the universality of subjecthood and to resist the pressure to link the natural rights of the UK subject to the positive law of the British state, had nonetheless at last succumbed to the demand of a modern world that personal status, together with the rights normally flowing from that status, be more clearly delineated on territorial lines. The 'natural' universalism of British subjecthood was at last to be territorially qualified. In the word of one parliamentary commentator, the 1948 Act's establishment of United Kingdom and Colonies citizenship had likewise:

> ...created a new geographical; and territorial entity known as the 'United Kingdom and Colonies'...[232]

Had this new territorial citizenship, however, similarly reconstituted this new geographical entity, giving explicit voice to an ethnic or contractual notion of statehood and a conceptually comprehensive UK citizen?

1.2. The Citizen Doubted

The brief answer to this question, however, is no. First, given the United Kingdom's continuing ethnic diversity and on-going role as a country of net immigration, a pre-political and communitarian basis for national belonging continued to be highly inappropriate. Soil and not blood remained the well-spring of national feeling. Alternatively, as noted in the House of Lords during debates on the 1981 Act:

> What has made us British is that out ancestors came here and that their children were born here.[233]

Accordingly, *ius soli*, though sadly qualified by the 1981 Act,[234] retained its formally regulatory status, determining that the vast majority of those born within the ever diminishing territory of the UK—post 1981, minus even its remaining colonies—would, by organic association and quite regardless of race, creed or religion, be deemed to be British citizens. Indeed, disregard for communitarian notions of national belonging was such that the one historic manifestation of *ius sanguinis* in UK law was likewise to be foreclosed: the 1981 Act providing that children born outside the United Kingdom to at least one British parent, might become

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[232] Lord Altrincham, Hansard [House of Lords, 21 June 1948], at 989.

[233] Lord Elwyn-Jones, Hansard [House of Lords, 22 June 1981], at 860.

[234] Restricting *ius soli* to the children of parents 'legally settled' within the UK at the time of birth, cf, for discussion, *infra*, III.A.1.3.

British *only* if that parent had themselves been born within the UK.[235] Nationality by descent would apply to one generation only, and race would play no part within the post-war concept of the British state and citizen.

More interestingly, however, was the vehemence of the UK Parliament's eschewal of a contractual basis for notions of British belonging. The new statutory notion of *ius soli* derived citizenship notwithstanding, the 1948 Government was eager to assure an anxious Parliament that the retarded recognition by British law of the term 'citizen,' and indeed the corollary demise of the 'subject,' should neither be taken as an insult by those who were loyal to the Monarch, nor be regarded as a foolish attempt to introduce republican and possibly revolutionary principles into the United Kingdom. The Secretary of State, responding to concerns that the adoption of UK and Colonies citizenship would both weaken affection for the Crown and give false hope to those 'colonial natives' who remained without a political assembly of their own,[236] was thus happy to note that in British law, as in other less worldly kingdoms, the word 'citizen' would diverge from the meaning more commonly ascribed to it by political philosophy.

> I do not think that there is anything revolutionary in a person being called British citizen. After all Bunyan in the *Pilgrim's Progress* refers to the citizenship of Heaven, and as far I know heaven is not conducted on republican Principles.[237]

Similarly, the authoritative voice of 'the law' in the person of the Lord Chancellor, was keen to add its weighty assurance that citizenship of the United Kingdom and Colonies had nothing at all to do with contractual notions of government and would thus not act as the vital gateway to material rights:

> Citizenship gives no rights and privileges whatsoever.[238]

Equally, by the same token, it would not furnish the individual Briton with a solid bulwark against potentially offensive parliamentary law-making:

> Hitherto we have not had any law discriminating against any British subject. I hope we never shall, but I do not know. If you are minded to discriminate, you can

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[235] Nationality was previously acquired by virtue of simple registration with British consulates.

[236] Somewhat reactionary concerns, though most elegantly expressed, cf, by Lord Altrincham, *loc cit*, n 232, at 990 *et seq*.

[237] Ede, Hansard [House of Commons, Vol. 5], at 393.

[238] Hansard [House of Lords, Vol. 55], at 784.

discriminate whether you call them 'subjects' or whether you call them 'citizens.'[239]

In short: as ever, the notion of parliamentary sovereignty was to remain the defining characteristic of the British Constitution—determining that whilst a terminological shift to citizenship had taken place, the new citizen would nonetheless not be incorporated within the British state and body politic, or alternatively be equipped with automatic access to a series of rights which might thus fetter the 'constitutive' Parliament. Contractualism and voluntaristic statehood were therefore forever to remain foreign to the UK.

A stance maintained throughout the post war years, the non-incorporation of the UK citizen was most clearly expressed in the 1977 Bill introducing what was to become the 1981 British Nationality Act. Paragraph 2 of that document, entitled *civic privileges*, thus confidently asserts:

> An important aspect of citizenship is the privileges associated with it. In this country the common status of British subject,[240] held in our law not only by citizens of the United Kingdom and Colonies but by all Commonwealth citizens, carries with it voting and other privileges. There are also special arrangements for citizens of the Irish Republic. Such privileges do not stem from the law of nationality and so are not dealt with in this document.

Alternatively, the drafter, though clearly cognisant of the usual meaning afforded the term 'citizen,' nonetheless subtly altered its formulation so as to reflect the UK Parliament's abiding refusal to base its legitimacy upon it. First, the language is of privilege and not of right. Secondly, those privileges, which Parliament may, if it feels it to be appropriate, extend to British citizens may also be and is conferred upon non-British citizens.[241] Thirdly, and as a consequence, the whole basis of contractualism is rejected: Parliament is not constituted by British citizens with automatic access to political rights—their right to vote instead being fully contingent upon the body which claims to represent them.

There is undoubtedly a paradox in such a conclusion. Much of the immediate post-war re-alignment in notions of 'Britishness' thus derived from a fairly honest desire to recognise the claim of post-colonial and

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[239] *Ibid.*

[240] This dormant status, however, now defunct (BNA 1981).

[241] Both UK resident Commonwealth citizens and a significant group of Irish citizens currently endowed with political rights under the 1983 Representation of the Peoples Act.

emerging nations' to all the accoutrements of modern statehood, including a contractual and egalitarian notion of citizenship. As the British Parliament conceded:

> Many of them [sic: the new nations] associate the word 'subject' with being members of a subject race.[242]

Further, their 'new nationalism' or feeling that they were 'self-governing communities,' was to be respected by the British Parliament's linguistic sensitivity in giving preference to the notion of citizenship of the commonwealth above that of British subjecthood:[243]

> ...we must throw overboard the old conception of a British subject as something imposed from above, and we must then come to the new conception of the common factor based on Dominion citizenship, the terms of which shall be enunciated by each Dominion.[244]

In other words: for the Commonwealth an equal citizenship based upon a common community of horizontal association; for the UK, however, a seemingly empty citizenship imposed upon a British populace by its own Parliament.[245]

1.3. The Basis for National Belonging?

Given the absence of any clear legal commitment to notions of ethnic or contractual citizenship a question nonetheless remains as to what beyond the remedial affection for 'soil' now forms the basis for a specific notion of belonging to the UK. An issue which has gained in importance as the territorial extent of the concept of British citizenship has slowly been eroded, the answer nonetheless remains somewhat elusive; successive administrations slowly beginning to adopt the notion of a 'close connection' with the UK,[246] but failing clearly to enunciate its meanings.

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[242] Secretary of State (Ede), Hansard [House of Commons, 7 July 1948], at 470.

[243] *Supra*, note 218, Emrys Roberts, Hansard, [House of Commons, 7 July 1948], at 433.

[244] *Ibid.*

[245] Note, however, that the failure coherently to reconstitute the state and citizenry was one prevalent throughout the Commonwealth—Australia only very recently having established a contractual link between its populace and Parliament—with radical constitutional overhaul seemingly being confined to States such as India who no longer recognised the British Monarch as a Head of State, V.K. Shukla & D.N. Singh, *The Constitution of India* (Eastern Book Co.: Lucknow 1975). Regal institutions it would thus seem, do not fit at all well with modern philosophical constructs.

[246] Reginald Maudlin, Hansard [House of Commons, 8 March 1971], at 46.

In other words, with the arrival of 1981 British Nationality Act which for the first time created a distinct category of British citizenship limited to the territory of the United Kingdom, the question of a distinct national belonging would appear to have become an imperative one. True to form, however, the foundations of the nation remained indistinct. Thus, while in the run up to parliamentary the Conservative Political Centre was to promote radical reform with a document tantalisingly entitled 'Who Do We Think We Are?,'[247] the underlying issue of who exactly might be said to 'belong to Britain,'[248] and on what basis, was not to be addressed directly, but was instead to be lost in the mass of technical provisions skirting their way around the 'political and legislative minefield' of the transition from colonial to national citizenship.

Indeed, the sole indication that the political community had given any consideration whatsoever to the need to create a distinctly national sense of community was the qualification of the notion of *ius soli*, British citizenship now being acquired by birth within the UK only where one parent was legally settled within the Country at the time.[249]

Greeted by the most infamous voice in post-war nationality debates with the words:

> ...the old principle of allegiance which we turned out of doors in 1948, is found not to be dead but sleeping; for allegiance is the very essence of nationhood, there is no meaning in nationhood without allegiance...[250]

the qualification of *ius soli* might thus be read as an attempt to limit British citizenship to those demonstrating 'loyalty,' or a positive commitment to the mores of British society, and more particularly to a sense of legality or respect for the law.

However, given first that this provision was to attract the greatest degree of criticism of all post-war legislation, the contempt for it amongst the institutions of UK civil society perhaps best summed up by a House of Lords considering it to be

> ...morally questionable and racially decisive.[251]

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[247] Conservative Political Centre, London, March 1980.

[248] *Ibid*, at 6.

[249] BNA 1981, SS 50 (1)-(4), in connection with S 33 (1) of the 1971 Immigration Act, no illegal entrant under the former might claim to be settled under the latter.

[250] Enoch Powell, Hansard [House of Commons, Vol 997 1980/1] at 967.

[251] Lord Elwyn-Jones, Hansard [House of Lords, 22 June 1981] at 859.

And further, that it appeared to act as little more than a somewhat petty instrument of immigration control, potentially rendering various persons stateless.[252] It is nonetheless tempting to conclude that qualified *ius soli* had but little to do with establishing a degree of philosophical concordance between the individual Briton and the institutions of the British State. On the contrary, it had instead undermined the 'principles upon which the moral consensus' which had anciently characterised the nation had been built;[253] representing an assault by the sovereign British political community's upon the true essence of the doctrine of allegiance—the notion of a natural universalism existing prior to and being unassailable by the institutions of a territorial and man-made political state.

1.4. Conclusion

At one level, the final passage into UK law of a curiously empty term of 'citizenship,' may be argued to be both a result and a reflection of a UK Constitution which in placing sovereignty in the hands of a parliamentary political community, both acted as a barrier to the conceptually coherent post-war re-constituting of the British state and enabled that same political community to refashion the basis for Britishness through simple and philosophically-empty political edicts.

As such, nationality legislation had the curious effect of undermining certain of the foundations of UK constitutionalism, whilst also confirming and leaving the structural Constitution in tact. With regard to the issue of the relationship of individual Briton to British state, this determined that while on the one hand, a new category of Britons had been established; on the other, the relationship maintained between those new Britons and British State would alter little. The limitation of the universalism which allegiance had entailed was thus likewise to herald a curtailment of the natural notion of Britons existing prior to and independently from the British body politic. Parliament and political law it seemed would play the primary part in identifying Britons. However, by the same token, the body politic or Parliament would not admit such newly identified Britons into the British State. Allegiance was not to be replaced by contractualism, and whilst the Briton may have been identified by Parliament he was not to be 'created' or positively constituted by higher rights. Instead,

[252] That is those born in the UK failing both to gain UK citizenship or the nationality of their parents.

[253] The Roman Catholic Bishops of Britain and Wales, cited by Lord Elwyn-Jones, Hansard [House of Lords, 22 June 1981] at 859

'representation' remained the mode by which a connection between a by now very curiously 'detached' British populace and body politic was to be established.

Interestingly, however, the continuing and unique enfranchisement within the UK of Commonwealth and Irish citizens—or the representation of non-Britons within the British body politic—would similarly seem to indicate that while the 'natural' shoot of UK universalism had finally been uprooted, its practical effects nonetheless lingered on. Accordingly, the same may be said for the Briton's natural autonomy, or the preservation of a wide sphere of private action, having little to do with the state and being regulated instead by a non-political common law. In abstract juridical terms, the continuing existence of a private sphere 'without' the state is confirmed by the legal edict that whilst allegiance plays no longer plays a part in determining Britishness, 'it nonetheless flows from it;'[254] so re-establishing—presumably on a somewhat feudal basis—the individual Briton's loyalty to Monarchical authority (by now merely symbolic) and a common law arguably pre-dating political authority.[255] In real terms, however, the continuing importance of the pre-statal private sphere in UK society may likewise be demonstrated by the other side of the coin to post-war nationality legislation—the Race Relations Act or the 'privatisation'[256] of the issue of race relations and the manipulation of the common law 'rule of law' to ensure on-going and civic social development.

2. *Race and the Rule of Law*

As one very convincing thesis would have it,[257] post-war nationality reform together with the evolution of a policy to soothe troubled race relations, was a clear latter-day manifestation of modern British government's continuing adherence to both the pre-occupations and institutional tactics of the *ancien* regime. Supposedly large-scale immigration from the former colonies and commonwealth had precipitated a degree of social unrest within the UK; the move to a multi-racial society being marked not only by the institutionalisation of openly racist

[254] O. Hood Phillips, *Constitutional and Administrative Law* (7th Edition) (Butterworths: London 1987).

[255] More immediately in relation to the common law notion of treason, but by association confirming the 'original,' *ie* pre-Dicean bond between populace and common law.

[256] A. Favel, *Philosophies of Integration*, *op cit*, 7.

[257] *Ibid.*

sentiments within organisations such as the National Front, but also by an ever-increasing degree of racial violence. As the 'white' backlash reached crescendo in the early 1970s with Enoch Powell's notorious 'rivers of blood' declaration, the British political establishment was drawn to tackle the traditional bugbear of British social life: potential social conflict.[258] The policy instruments which were chosen to deal with perennial nightmare of social upheaval, however, were the traditional ones of 'paternalist leadership' together with a reliance upon a private non-statal sphere and the regulatory functions of the rule of law.

2.1. The Paternalistic Political Elite?

In short, or so it is argued, the empty formulation of Britishness to be found in British nationality law was a pragmatic political means whereby UK successive governments could respond to certain of society's demands that immigration be slowly restricted without, however, ever fully stemming the flow of migrants or, more importantly, inflaming social conflict by engaging in an *explicit* discussion of whether British society be possessed of certain unifying cultural or moral characteristics. As always, the issue of immigration and cultural identity would not be subject to the potentially illiberal forces of radical democracy and instead the British populace would be guided by a benign political elite which would legislate 'in the best interests of the nation.' In this manner, the political and social minefield of post-colonial national adjustment would be safely negotiated. And indeed, or so it is maintained, the obfuscating policy of the establishment was so successful that within the remarkably short period of 20 years, white supremacist movements had more or less disappeared from the UK scene, whilst the credo that the UK was a 'multi-racial' and 'multi-cultural' society was not so much a commonplace as an apparently immemorial facet of British life.

Whilst in purely legal terms, it is nigh on impossible to verify whether post-war political thinking followed the traditional Blackstonian or Dicean principles that the interests of the nation were best to be served by keeping the 'foolish' Briton as far away from politics as possible, it is nonetheless apparent that nationality debates did clearly link the issue of national citizenship with that of race relations, and were likewise marked by an unusual degree of (self-satisfied) paternalism. In the mind of Britain's 'sagacious' and 'temperate' political elite, British society's unfortunate

[258] *Supra*, B.2.1.

propensity to open discrimination and disorder had been handled in an exemplary manner:

> We have a problem of community relations as everyone knows. I believe that we in this country have handled it as an example to the rest of the world, and I believe that we can and shall continue to do so.[259]

Equally, however, and beyond such legislative paternalism, the second plank of the political establishment's mission to dampen social disorder and ease the transition to a new form of national citizenship—the Race Relations Act and residual reliance upon the self-regulatory characteristics of a private sphere governed by the rule of law—left a clear legal mark, so furnishing a normative key to current UK thinking upon national citizenship.

2.2. The Rule of Law: the 'Privatisation' of Race Relations

As noted, much of the emptiness within the post-war definition of 'Britishness' is argued to have derived from a political pragmatism which saw successive administrations avoid upon the existence of supposedly defining national characteristics in an effort to avert social conflict.

Beyond such pragmatic considerations, however, the failure either to incorporate the British populace or to ascribe to it any supposedly inherent cultural moral or ethnic characteristics likewise seemed to reaffirm the historical concept of a detached and non-statal 'community' of Britons. Though the unbounded universalism of the doctrine of allegiance had been somewhat restricted, Britons remained 'ill-defined' and so continued vitally to differ in their identity from Frenchmen. Alternatively, as the moral persona of French citizens is still inextricably linked with the philosophy of the Republic and the French Nation, the French are 'French first,' and only secondly social individuals with a series of 'natural' relationships of their own.[260] Britons, by contrast are not inevitably a part of the British state, do not derive their moral characteristics from it, and are so primarily 'natural' and social individuals with only a secondary 'representative' attachment to a British body politic. In other words, whereas in French state theory, 'Nation,' 'Republic' and individual identity are necessarily conflated,[261] the altogether more fluid contours of the UK Constitution determine that the national polity has no philosophical or

[259] Reginald Maudlin, Hansard [8 March 1971], at 42.

[260] A. Favel, *Philosophies of Integration*, *op cit*, 7, at 84.

[261] *Ibid.*

identity-forming primacy and that 'Britishness' remains a natural or social—rather than political—construct.

Seen in this light, the Race Relations Act of 1976 which sought to ensure racial equality not through a positive or statal commitment to a higher 'right' of non-discrimination, but which instead introduced a 'private' notion of non-discriminatory social interaction, becomes significant for two interrelated reasons. First, once again determining that the state and/or polity play no part in the constituting of individuals or the definition of cultural identity. And conversely, augmenting the common law notion of the 'rule of law' to take account of questions of race, so furnishing a pre-statal private sphere with a regulatory framework in which to evolve its own view of 'Britishness.'

The essential characteristics of the Act—its immediate application to private relationships and the room which it leaves for cultural self-definition—thus re-affirm the primacy of a natural British society above a philosophically-construed polity. First, 'race' is a matter of civic social relations in a private sphere and not one of positive higher rights which are established by and may be asserted against the body politic. Unlike continental schemes, the UK did not first establish protective rights for minorities against the state and then extend such protection to private social interaction.[262] Rather, the process began in the private sphere: a blanket obligation not to discriminate in employment or contractual relationships, representing a strengthening of the rule of law between non-statal actors so as to take account of race.[263] Equally, however, the state or polity played no part in defining which 'national' or 'ethnic' characteristics were to be protected by British law. Instead, applied by common law courts, the simple and unspecified ban on all discrimination upon the grounds of 'race, ethnicity or national origin,' opened up a social and pluralist process of cultural self-definition with various groups and individuals applying for and receiving protection on the basis of their own subjective—rather than the state's—perception of ethnic and national difference.[264]

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[262] Or alternatively, beginning with hierarchical constitutional rights and then developing a horizontal doctrine of *Drittwirkung*.

[263] Though note that the introduction of a positive 'duty' into the notion of the rule of law is a slight variation on tradition UK (English) legal thinking—the rule of law more generally relating to the weighing up of existing interests or 'rights,' more specifically property and contractual rights. Equally, in this sphere of the rule of law, the state is itself best conceived of as a private actor.

[264] A. Favel, *Philosophies of Integration*, *op cit*, 7.

With the broad result of such a privatised scheme of good race relations being the gradual evolution of the much-famed notion of 'multi-culturalism within one nation,' parliamentary additions to the notion of the rule of law thus laid down a naturally universalist (*ie*, free from constructed political/philosophical considerations) view of civic equality which so allowed a non-statal UK society to decide for itself which would become the prevailing view of 'Britishness.' Insulated from any political guidance or philosophical insistence upon supposedly prevailing moral or cultural characteristics, a private sphere regulated only by the common law made its own post-war adjustment to a de-colonial world; so enabling a natural transition to a pluralist, multi-racial and multi-cultural concept of citizenship *within* the territorial borders of the UK.

3. Conclusion

The withdrawal of British citizenship within the territorial borders of the United Kingdom, is thus indicative of a curious post-war process whereby large-scale social and political change was achieved without a substantial alteration in the foundations of the British Constitution. The apparent predominance of the political community notwithstanding, the underlying vision of the British State and the relation of the Briton to the state was to alter little.

The pivotal element ensuring such constitutional atrophy, however, was the continued reliance upon the Dicean edict that political institutions and not the populace be sovereign. An anti-contractarian view of the British State which at once allowed Parliament radically to alter the legal basis for 'belonging' to Britain; the enduring sovereignty of Parliament rather than the people, likewise acted as a bulwark against the coalescing of concepts of state, nationhood and the body politic. The Briton remained what he had ever been: autonomous. Whilst 'identified' by Parliament he was not 'created' by the state and instead retained a wide non-statal sphere of private action in which he himself might determine the social contours of a notion of 'Britishness.' Equally, while the unbounded 'natural' universalism of Lord Cooke's concept of allegiance had succumbed to the immediate political demands of one political elite, it had in large measure been reborn in the 'naturally inclusive' provisions of the Race Relations Act; so ensuring that the on-going social construction of post-war 'Britishness' never be delimited by (man-made) issues of race, culture or, perhaps more importantly, by demands for a philosophical concordance between Briton and British state. Vitally, the Briton was a universal social

individual first; his attachment to the body politic being only a secondary matter of representation within the Sovereign Parliament.

A double-edged sword, the anti-voluntarism at the heart of the British Constitution determined that the Briton—never constituted by positive rights—would retain his curious dual status. On the one hand, a legal subject with a wide-ranging and private sphere of autonomy existing outside the British state. On the other, a political citizen represented within rather than constituted by and constituting of, a potentially despotic, and often paternalistic body politic.

B. The Decline of the Industrial Citizen?

In its purest normative formulation, modern notions of welfare or social citizenship are often argued to represent the apex of citizenship evolution.[265] Alternatively, with its emphasis upon 'substantive equality' and 'inclusion,' the threefold scheme of core civic, intermediate political and additional social rights, seems once and for all to settle the historical dilemma of how to establish a balance between the civically and politically empowered but potentially self-interested individual citizen, and the demand of the political community, or *polis*, for a sustaining degree of social cohesion.[266] In a very modern social contract, the 16th Century voluntaristic pact between individual and state is therefore extended beyond the sphere of purely formal civic and political equality to instead include a measure of substantive social justice; so constraining the potentially selfish tendencies of the formally autonomous citizen, and thus establishing and securing a universal community upon the basis of shared social rights, or substantive and equal opportunity.

Community-forming and community-securing, the concept of social citizenship has nonetheless latterly been subject to a degree of pressure; with many western democracies curtailing the breadth of social rights as demographic changes and internationalised wealth-creation have dramatically curtailed the social budgets of developed nations.[267] This financial squeeze upon the extended contractual vision of substantive equality has been noted in the United Kingdom as elsewhere; and yet, the precipitous decline of social citizenship within the UK might likewise be argued to stem from deeper structural roots, or the inherent instability of

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[265] R. Dahrendorf, *Der moderne soziale Konflikt*, *op cit*, n 16.

[266] *Supra*, II.A.3.3.

[267] Preuß, 'Two Challenges to Modern Citizenship,' *op cit*, n 5.

the 1945 constitutional moment which—ever true to institutional conservatism—failed effectively to translate a particularist claim for social redress into a universal and community-building concept of social equality.

1. Social vs Industrial Citizenship: Community vs Particularism?

Alternatively, or so it is increasingly argued,[268] T.H. Marshall's famous analysis of citizenship evolution draws heavily upon historical circumstances peculiar to the UK and consequently locates the genesis of modern social citizenship not in a uncontested normative desire for sustainable community, but rather in a factual and drawn-out process of class tension and schism.[269] The preference for the term 'industrial' above 'social' citizen is thus not incidental, but instead has firm roots in the insistence that the western notion of citizenship itself entailed an apparent contradiction: the formal equality endowing characteristics of civic and market-forming rights nonetheless leading to substantive inequality as feudal economics were overcome and a market-economy predicated on inequality, or the creation of a disadvantaged industrial class, was established.

Thus, in the United Kingdom at least, the primary significance of civic rights lay not in their moral property, or normative confirmation of the inherent equality of man. But rather in their practical ability to secure 'contract' above 'status;' so laying the basis for a market system itself promoting of and predicated upon inequality. In turn, those substantively impaired by the market process—or an industrial class—were to find a common interest in their inequality, or a collective will powerful enough to ensure—through struggle—first, political representation and then a measure of wealth-redistribution. In short, industrial citizenship within the UK was both an inevitable result of class struggle, and an institutional fulcrum; serving social order by correcting—through social provision—the substantive social disparity which derived from formal civic equality.

Given the central position of the notions of struggle—as well as the predominance of particularist class interests—within the history of the evolution of UK industrial citizenship, an immediate question therefore arises as to the exact nature of the constitutional moment of 1945. Was it a political or constitutional event? Alternatively, was the social reform which it initiated simply a case of satisfying the immediate and potentially

[268] For various authors and arguments, cf, A. Favel, *Philosophies of Integration*, *op cit*, 7.

[269] T.H. Marshall, Citizenship and Social Class, *op cit*, n 11.

revolutionary demands of the socially disadvantaged; or did it entail some deeper attempt to 'normativise' industrial citizenship, so taking it out of its historically conflictual (and seemingly utilitarian context) and building instead a clear and on-going constitutional commitment to a community-forming and community-securing concept of social citizenship? Was a modern social contract to be formed between *all* Britons; an explicit and class-neutral notion of social justice evolving out of what had been a long history of socially-divisive industrial conflict?

2. *Collectivism and Sovereignty: The Unholy Alliance?*

At the level of pure political analysis, the UK Welfare State in which the post-war notion of social/industrial citizenship was embedded, is sharply distinguished from its continental and Scandinavian counterparts.[270] Where some nations sought to give individuals eternal primacy over market processes through higher—state-mediated—rights, while yet others sought to reconstitute the entire free-market process through its eternal marriage with the regulatory *Sozialstaat*, the UK followed a curiously haphazard course. On the one hand, eschewing both higher rights or a comprehensive restructuring and taming of the private economy. And on the other, selectively creating pockets of 'joint national ownership,' while allowing simple universal access to newly-created institutions of wealth redistribution such as the health service.

Moving beyond this structural consideration, however, it is equally readily apparent that the new social citizenship of the Briton (embedded within the Welfare State) had thus not entailed the normative reshaping of the UK Constitution. Neither were social rights entrenched; nor was the free market to be coherently refashioned to suit the demands of the representative state.[271] Instead, the new pact between Briton and British State was secured simply by a purely political and highly selective programme of nationalisation,[272] underpinned by a political and collectivist notion of 'joint national wealth ownership.'

Alternatively, Attlee's Government had chosen not to give explicit expression to its goal of establishing social parity through a radical reconstituting of the body politic; and had instead relied upon the

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[270] G. Esping-Andersen, *The Three World of Welfare Capitalism*, *op cit*, n 209.

[271] Alternatively, the public/private divide be re-adjusted.

[272] Thus, for example, the finance markets almost entirely escaped any governmental intervention into their activities; such enormous wealth it would seem would never be jointly held, M. Everson, *Laws in Conflict* (PhD Thesis: Florence 1992).

constitutive power of a parliamentary sovereign to effect the necessary changes in UK economic organisation. In other words, the ascendant Labour creed of 'collectivism'—or the notion of a unitary national desire for social parity[273]—was simply to be wed with parliamentary sovereignty. In terms of the national community, the Sovereign in Parliament was thus deemed to embody a collective national will to push through social change; while the political community was itself adjudged to be the natural mouthpiece of the British populace's supposedly indivisible desire for substantive and universal equality. The joint national will desired a universal and community-building social compact, and parliamentary legislation—being no more than an expression of the national will—would effect that compact.

In purely Dicean terms, the 1945 Parliament appeared thus to have taken on the guise of the collectivist and despotic sovereign which had been the bugbear of individualistic utilitarian thought.[274] Foolishly casting aside centuries of self-limiting political tradition, the newly empowered Labour government had deviated fatally from the Dicean creed that collective welfare was commensurate with restrained political action dedicated solely to securing individual freedom. It had further, and more damagingly, recast the political community's role: no longer regarding the Sovereign Parliament as a benign mentor to an essentially private British populace—and on the contrary, giving it a role as the positive expression of the joint and immutable will of a collectivised rather than individualistic nation.

Moving beyond such possibly outmoded views, however, Attlee's attempt to reconstitute parliamentary legislation as a positive expression of a collective national will, was likewise to draw much contemporary criticism from within the very social movement from which it had sprung. Most significant was a long-running critique on the part of pluralist elements within the Labour party, who had long held that the simple

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[273] Note that the post WWI re-alignment in the Labour movement which saw the Labour party sever its few remaining bonds with liberalism and instead evolve a collective approach to the securing of national welfare, was the determinative factor in post-war British politics: collectivism likewise heralding an explicit attempt to create a 'statist' rather than 'individualistic' view of British government. With a new conservatism likewise shedding any links with the liberally-tainted Toryism of the 18th century, the new 'statism' was similarly to become a vehicle for nationalistic (though not necessarily socially welfare-oriented) conservative post-war politics, S. Beer, *Modern British Politics: Parties and pressure Groups in the Collectivist Age*, (Third Edition) (Faber: London 1982).

[274] *Supra*, II.B.3.3a).

equation of sovereign power with an indivisible national will was no more than a crude manipulation of complex social and political processes. The pluralist critique—having an import far beyond the border of the United Kingdom—thus bemoaned the efforts to transfigure a numerically limited but sovereign political community into a supposedly natural expression of collective voice. Society needed change to ensure social justice, but such change could not simply be brought about by shallow tinkering with the philosophical basis underlying the exercise of sovereign power. Attlee had vision, but not enough:

> They see that the historic formulae of representative government—whether in its parliamentary or congressional form—are no longer adequate to the kind of society in which we live. But they make, I think, the mistake of assuming that the problem is solved when a reconstruction of the pattern has taken place, however adequate that reconstruction may be. They believe that there is some mechanism for making sovereignty an expression of what Rousseau termed the general will of the Community.[275]

Certainly, Attlee had come some way to meeting the demands of Britons that true social equality be established; dispensing once and for all with the UK's clinging adherence to limited notions of government and the political community's restriction of its and the state's role to the securing of the formal civic equality of the Briton. However, in being based upon the equally dubious collectivist notion that the parliamentary sovereign naturally represented the joint and indivisible will of the nation, he had failed dismally to secure a lasting, socially-receptive contract between British people and the state. In a pluralist twist, the conflation of between sovereign power and collective will was, for all that it was well-meaning:

> Profoundly mistaken for the simple reason that there is no general will in the Community at all. We never encounter any will that can be denominated good by definition[276]

Alternatively, though so often seen as an import into the British Isles and clearly disapproving of many of the UK's prevailing normative preconceptions,[277] pluralist thought nonetheless appeared to draw heavily upon the ancient notion of a British society existing independently from

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[275] Laski, 'Law and the State,' *loc cit*, n 2, at 212.

[276] *Ibid*, at 212.

[277] In a strange continuum which saw the genesis of UK pluralist critiques in Maitland's translation of Gierke's, *Political Theories of the Middle Age*, *op cit* n 143; a work which in Germany seemed only to contribute to the most extreme of collectivist movements—the creation of a holy ethnically determined state or sovereign ethnic community of Germans.

and outside the state: the body politic could not simply claim to be the natural expression of the joint will of what was—with the full blessing of centuries of anti-statist constitutional thinking—a disparate and self-defining group of individuals and associations:

> A number of minds does not become one mind any more than a wood is a tree or a hive a bee. The will of the state is the will of certain persons exercising certain powers[278]

Worse still, unadulterated even by any constitutional limitations—or refusing ever to admit of any formal contractual relationship with the British people[279]—and likewise continuing to build upon historically paternalistic patterns of political leadership,[280] the British parliamentary sovereign appeared the most ill-equipped of institutions to make a claim to being the natural expression of the national will. In its own way as absurd a fiction as the elitist mixed commonwealth of 18th Century thought,[281] the collectivist re-working of the explicitly hierarchical and detached (from the populace) notion of parliamentary sovereignty, was a highly unstable basis upon which to build a universal and community-building notion of social justice.

Through its championing of parliamentary sovereignty, or in the words of one pluralist commentator, the UK's 'most baleful political inheritance,'[282] the British Constitution had failed formally to recognise even the most rudimentary of social contracts. Voluntarism, or the notion that the body politic be created by the common will of the British people had long been rejected. In turn, the assertion that the sovereign Parliament had overnight become the natural representative of a collective and indivisible national desire for universal social justice would fail singularly to convince. Particularism had not been converted into universalism. A small group of politicians had instead hijacked the sovereign power and tailored it to meet the needs of the class it felt it represented. The golden opportunity to create a lasting and just social compact between state and

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[278] Laski, 'Law and the State,' *loc cit*, n 2, at 212.

[279] Though to Laski himself higher law, at least in its national manifestation, was similarly an anathema—tending on the one hand, only to concretise the fictional general will imposed by one political community at one particular time, ('Law and the State,' *loc cit* n 2), and on the other to give far too great a degree of power to undemocratic judicial cadre (Parliamentary Government in England, op cit, n 68.

[280] *Supra*, III.B.2.1.

[281] *Supra*, II.B.2.1a).

[282] P. Hirst, in *idem*, *The Pluralist Theory of the State*, *op cit*, n 2.

Briton had been missed. The Welfare State and with it the notion of industrial citizenship remained a matter of the particularist conquest of common and sovereign institutions by isolated class interests. Within the UK's still autonomous society, other interests and views would arise, and in time make their own particularist assault on the sovereign power. Attlee's collectivism would be turned against the very Welfare State which it had created—Thatcher declaring instead that it be the national will to dismantle it.[283]

3. Conclusion

At the constitutionalist level, the politically contested nature of the UK's retarded effort to establish some form of '(welfare)-statism'—and thus a sufficient degree of national community to secure on-going social parity—might be attributed to a constitutional atrophy which clung to an anti-voluntaristic concept of constitutionally unfettered parliamentary sovereignty. Statism could thus not achieve a secured normative status. Certainly, Attlee had attempted to alter the foundations of British patterns of governance: dispensing with the notion that the parliamentary sovereign merely identified and legislated for 'the best interests of the nation,' and promoting in its place the concept of a Sovereign Parliament which expressed the will of the 'national community.' However, the failure formally to incorporate Britons within the body politic which supposedly represented their will, was to have a dual and destructive effect. On the one hand, reinforcing the view that British society, being divorced from the British State, was far from being a cohesive national community, and was instead made up of a pluralist series of disparate private and associative interests with little if no common will. And on the other, contributing to the impression that the programmes of a normatively unfettered body politic were not the expression of an indivisible and politically-incontestable national will, but were instead little more than the ideological pronouncements of whichever particularist elite was in the parliamentary ascendancy.

Similarly, however, the failure normatively to secure post-war statism, equally explains the weak and contested nature of the post-war Briton's social citizenship. As the Welfare State remained a politically contested project, the social citizenship embedded within it, could not be divorced

[283] *Supra*, n 273; though the irony of an individualistic Conservative part calling upon the notion of a collective national will in order to pursue its atavistic programme can hardly be missed.

from the historical struggle from which it had sprung. Founded upon contingent political processes rather than an uncontested concept of social justice, social provision within the UK might never claim universal support from an ever elusive national community. Rather, social citizenship instead appeared to represent little more than the assault of particularist interests upon the national economic pie.

C. Post-Statal Citizenship?

It is common to present the conundrum of the creation of an effective citizenship of the European Union in terms of the difficulties of establishing a post-national citizenship.[284] Alternatively, the greatest problem which the EU is argued to face is that of establishing a sense of loyalty (or allegiance) among European citizens for a supranational organisation possessing none of the positive community-forming characteristics of the Nation State. Ethnically, culturally and philosophically diverse, the European Union would thus seem exceptionally ill-suited to the task of creating binding horizontal bonds between its citizens, or 'fellow-travellers' in the post-national European project.

Rephrasing this initial analysis, however, it might likewise be argued that the major hurdle which a citizenship of the European Union must overcome is that of creating a post-statal relationship between the individual European and the EU. Nationhood, or a feeling of national belonging, it need thus be recalled is only one element within modern statal concepts of citizenship: the key to 'deep' variations upon a statal theme of citizenship whose core characteristic never alters.[285] Citizenship is an indissoluble marriage between individual and state. Constituted by and constituting of the state, the individual citizen is indistinguishable from the state. His 'moral' properties defined by the state, the traditional state-citizen is citizen of the state first and 'natural' social animal second. An 18th Century legacy, the inextricable linkage of 'natural' notions of individual moral personality with the positive higher law of the territorially-delimited state, was to undermine the 'original law of nations.' Mankind was no longer made of 'one breadth of God,'[286] and was instead variously 'created' by the man-made law of states.

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[284] Among others, J.H.H. Weiler, 'Reflections on Demos, Telos and the German Maastricht Decision,' (1995) 1 *European Law Journal*, 219.

[285] *Supra*, I.

[286] *Supra*, II.B.1.4, at n 86.

Seen in this light, the European Union's genesis as a simple international Treaty organisation and apparent continuing determination to eschew the accoutrements of statehood,[287] would seem to hold the key to the EU citizenship dilemma. With little or no ambition to create the European, or to be constituted by its citizens, it still aspires to its own citizenship and the creation of 'post-statal' links between Europeans and the Union. Equally, in seeks in no small re-establish 'the original law of nation;' Europeans to be given personality beyond the narrow borders of their man-made states. In a final twist, however, the 'deep' concept of UK citizenship, based on 'autonomy' from and 'representation' within the body politic or state, might thus be argued to be instructive.

1. The Private European: Autonomy vs Belonging?

What is the European Union but a private sphere in which individual Europeans might act first a natural social beings, and only secondly as citizens of some man-made entity? Shielded by 'stateless' European law from the 'unreasonable' legislative activities of national body politics,[288] the European citizen might create for himself the contours of a post statal European society.

Seen in this light, the source of loyalty for the EU is surely not to be found in a notion of 'belonging,' but rather in a sense of 'autonomy' that liberates the individual from constructed communities which by virtue of their crude aggregative collectivism cannot but be repressive of individual or associative personality?

Certainly, autonomy will always bring with it a danger of uncivil and selfish behaviour. But once again, as the UK's residual reliance upon the regulating functions of a stateless 'rule of law' demonstrates, a private sphere is not wholly dependent upon collective political or higher law-making for the maintenance of civility. Instead, the simple legal mechanism that ensures that each individual exercise a pre-statal liberty with due respect for the autonomy of others, may be a mechanism as securing of liberty in a social setting as any inspirational (but man-made) call to higher individual rights.

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[287] Though some influential voices within the Union still plead for the formal constituting of a federal European state, Mancini, 'The Case for European Statehood,' (1998) 4:1, *European Law Journal* (forthcoming).

[288] That is by Articles 30,49,52,58, 63 EC Treaty.

Alternatively, might it not be argued that the most loyalty inspiring of European legal provisions be—not those positive economic rights which seem to recast the European citizen in the role of market citizen[289]—but those which are reflective of a nascent and regulatory European rule of law: more particularly, the duty not to discriminate?[290]

2. Political Community vs Representation?

With the *Brunner* Judgement of the German Federal Court,[291] as to whether Europe might ever develop beyond a strictly delineated economic role: its ability to create a true political community being hampered by the cultural and linguistic diversity of citizens? In the minds of the German Justices it thus appeared that Europeans would never feel truly a part of European politics.

What then of representation? must the European be in possession of some quasi-spiritual link with the European political community? Can that community not instead be regarded as but one grouping within a diverse and complex society; but one in which all Europeans are represented?

The benign political leadership of the 18th Century commonwealth with all its connotations of hierarchy and paternalism may well be inappropriate to a modern world. But, under conditions of increasing scientific, economic and political complexity, can there ever be any real objection to modern political and technical 'expertise,' legislating—not with any claim to being the authentic voice of a European community—but instead, in the 'best interests' of Europeans?

IV. Conclusion

The UK's rejection of Rousseau's prescriptions on the nature of the state and citizen, may be no more than a historical accident: the reflection of the efforts of particular men at particular times to avert possibly revolutionary social disorder and to instead urge compromise upon the competing institutions of British political and social life. In the constant battle between people, Parliament and Monarchy, the ancient and at times archaic institutions of the Crown and common law were never to be fully uprooted. Instead, they continue to survive into a modern age acting as an immutable

[289] Everson, 'The legacy of the Market Citizen,' in G. More & J. Shaw, *New Legal Dynamic of European Union*, (Clarendon: Oxford 1995).

[290] Article 6 TEU.

[291] [1994] CMLR 57.

barrier to the reconstituting of the British state and its law, and with it the evolution of a conceptually coherent notion of British Citizenship.

However, behind the accidents of history, there also lurk very serious philosophical and normative considerations upon the nature of individual liberty and sovereign power: normative reflections which were to find their way into British constitutional thinking and so crystallise and preserve the very strange 'deep' concept of the relationship between the Briton and the British State. Where the French were to be created by the French State, Lord Coke's innate disapproval of the constituting but exclusionary nature of the law of men was to linger on into the present, determining that autonomous Britons would not only always possess a life outside the British State, but would be free to decide for themselves the social characteristics which would mark 'Britishness.' Equally, where in France, legitimate sovereign power was to be established by the incorporation of the populace within the state, in the UK political institutions rather the people were to be sovereign, dictating that Britons would always remain at representative arms length form power. Both the autonomous sphere of pre-statal social liberty and the political sphere of sovereign power would be guided by their own normative framework. Civility being maintained in the private sphere by virtue of a non political rule of law; and the sovereign power being controlled, or historically at least, by the prescription that it need be wisely exercised in the interests of the nation.

A subtle balancing mechanism, ensuring liberty not through higher rights but via a concordance of civil private interchange and self-limiting political action, cohesion was maintained not any quasi-spiritual and exclusionary notion of national belonging and community; and was only to falter as demands for substantive equality amongst Britons was to see a sovereign power unconvincingly claim to speak, not in the interests of, but for the nation.

As a final aside, however, this inability to sustain sufficient national community to ensure true social parity (the greatest weakness both in UK state theory and in the relationship maintained between Briton and British State) may now be argued possibly to be (again accidentally) on its way to solution; and, in perhaps the greatest ironic twist, not via formalised collectivisation or incorporation, but via the dissolution of the sovereign power of the parliamentary body politic. Though far too recent an event for detailed comment here, latter-day UK constitutional reform would thus at last appear to be going some way to meeting the English pluralist critique that the real problem in Britain is not the lack of a formalised constitution and incorporated state, but that of the exercise of sovereign and indivisible

power itself. Society is a federation of various groups and individuals: to create some common will and community out of this diversity is only to mythologise. Worse still, to attach sovereign power to a myth is to dictate. Is then, the UK's Parliament's simple 'devolution' (note no attempt is to be made to introduce a coherent federal 'state' into the UK) of powers to regional assemblies in Scotland and Wales, plus its extraordinary willingness to share its supposedly indivisible sovereignty with the Irish Republic and a (yet to be formed) N. Irish Council, a sign that the days of large-scale and unitary statehood are definitively over. No myths, no imposition of mythologically legitimated sovereignty, and instead the beginnings of a far more complex plural scheme of fragmented and interlocking sovereignties, and (if the word can be said to exist) semi-sovereignties; with far smaller, self-defining communities being the basis for true community, and thus sustainable (though probably on a less generous basis than in a welfarist post-war heyday) substantive equality.

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